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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 73

UNITED STATES OF AMERICA, APPELLANT

v.

GRINNELL CORPORATION, ET AL.

Nos. 74–77

GRINNELL CORPORATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court, including its findings of fact and conclusions of law (R. 741–767) is reported at 236 F. Supp. 244.

JURISDICTION

The judgment of the district court was entered on November 27, 1964 (R. 768–769), and notices of appeal were filed by the United States, Grinnell Corpo-

ration, Holmes Electric Protective Company and Automatic Fire Alarm Company of Delaware on January 25, 1965 (R. 770–787), and by American District Telegraph Company on January 26, 1965 (R. 781-783). This Court noted probable jurisdiction on May 17, 1965 (R. 788; 381 U.S. 910).

The jurisdiction of this Court is conferred by Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Loew's, Inc.*, 371 U.S. 38.

QUESTIONS PRESENTED

1. Whether the defendants monopolized the business of supplying accredited central station protection service, in violation of Section 2 of the Sherman Act. This includes the following subsidiary questions:

   (a) Whether the district court correctly found that the relevant product market is accredited central station service and that the relevant geographic market is nationwide.

   (b) Whether the defendants' possession of 87 percent of that market constituted illegal monopolization because (1) it gave them power to fix prices and exclude competition and (2) they acquired and maintained their market share by deliberate conduct and by restrictive and exclusionary practices.

2. Whether the relief granted by the district court was inadequate in some respects, and inappropriate in others.

3. Whether the district judge was personally biased or prejudiced or denied the defendants a fair trial.

STATUTES INVOLVED

Sections 1, 2 and 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, 2, 4, provide in pertinent part:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.
>
> SEC. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title; * * *.

Section 144 of the Judicial Code, 62 Stat. 898, 28 U.S.C. 144, provides in pertinent part:

> SEC. 144. Bias or prejudice of judge.
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further

therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists * * *. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

STATEMENT

In April, 1961, the United States filed a complaint charging that Grinnell Corporation ("Grinnell"), American District Telegraph Company ("ADT"), Holmes Electric Protective Company ("Holmes") and Automatic Fire Alarm Company of Delaware ("AFA") had violated Sections 1 and 2 of the Sherman Act by combining and conspiring to restrain and to monopolize, attempting to monopolize, and monopolizing the business of providing central station electric protection service (R. 30–45). After extensive pretrial proceedings, the case was tried in June 1964.[1] In November, 1964 the district court (Judge Wyzanski[2]) held that the government had established the violations charged, and entered a decree which differed

[1] As a result of the pre-trial proceedings, the government submitted only written evidence—excerpts from 38 depositions and 307 documents (R. 329–330, 331, 333, 335). The defendants called 31 witnesses (R. 350–696), introduced excerpts from 47 depositions and 773 exhibits.

[2] The complaint was filed in the United States District Court for the District of Rhode Island. The only judge in that district—Judge Day—disqualified himself, and Chief Judge Woodbury of the Court of Appeals for the First Circuit designated Judge Sweeney to sit in that court and hear the case (R. 40). Almost a year later Judge Sweeney withdrew from

markedly from the proposed decrees which the parties had submitted during pre-trial proceedings as appropriate if the court held for the government (R. 134–161, 741–769).

The appeals in Nos. 74–77 are by the defendants; they attack the findings of violation, challenge the relief as excessive, and contend that Judge Wyzanski was biased and prejudiced and denied them a fair trial. We shall refer to those appellants as the "defendants," and to ADT, Holmes and AFA collectively as the "alarm company defendants." The government's appeal (in No. 73) challenges the relief as inadequate.

A. THE CENTRAL STATION PROTECTION SERVICE BUSINESS.

Methods of protecting property against fire and burglary range from such primitive techniques as the use of watchdogs and watchmen to sophisticated electronic systems which automatically detect and report any hazards. The most effective protective system is central station service, under which hazard-detecting devices installed on the protected premises automatically transmit an electric signal to a central station[3] which takes immediate action to rectify the condition (GX 1, R 792; GX 3, R 848; GX 276, R 2131). The central station, which is manned 24 hours a day

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the case (R. 77–78), and Judge Woodbury then designated Judge Wyzanski to hear it (R. 79).

[3] The signal usually is transmitted over wires which the central station company leases from the telephone company, although some central station companies have their own wires (R. 353–354).

by skilled personnel, has a monitoring board which records both audible and visual signals from the protected premises (GX 3, R 852). Upon receipt of a signal, the central station immediately dispatches guards to the protected premises and, where appropriate, notifies the fire or police department over a direct telephone line (GX 1, R 795–796; GX 3, R. 855, 859, GX 342, R. 2943–2944; GX 346, R. 2985). Other forms of electric protection service include local alarms, which ring a bell or gong on the inside or outside of the premises; so-called auxiliary and direct-connected (remote station) systems, which transmit an alarm directly to police or fire stations; systems which transmit an alarm to a telephone answering service which, in turn, notifies the police or fire department; and proprietary systems, which in effect are central stations operated by the owner on his own premises (R. 520; GX 2, R. 813).

A central station system has significant advantages over other types of protection service. The system reports not only actual hazards as they occur, but also any malfunctioning in the system itself that would preclude it from reporting a hazard; the company takes immediate steps to rectify such malfunctioning (GX 3, R. 852, 859; GX 355, pp. 62–63; GX 278, R. 2145). For example, a central station burglary alarm system records not only attacks on the premises, but also such failures in the functioning of the system as a break in the circuit, a failure to activate the system when the protected premises are closed for the day, the deterioration of parts, etc. (GX 320, R. 2469–2470; GX 317, R. 2366). Similarly, complete central

service fire protection includes both sprinkler supervisory and waterflow alarm services—that is, the system automatically records in the central station not only the release of water through the sprinkler heads (which normally occurs only in case of fire), but also such threats to the effective functioning of the sprinkler system as leaks in the pipes or any significant change in the water pressure (GX 1, R. 808–810; GX 333, R. 2838–2839; GX 348, R. 3022–3023; GX 355, pp. 16–17[1]). On the other hand, a local alarm system or one connected to the police or fire department contains no method for constant check on its functionability. If, as sometimes happens, those systems develop defects—such as a short circuit in the wiring or a loss of pressure in the sprinkler system—the lack of any warning thereof may make the system useless when a hazard occurs (GX 333, R. 2837–2838; GX 331, R. 2781–2783; GX 320, R. 2470–2471).

Another important advantage that central station service has over other forms of protection is that it guarantees that there always are trained personnel who will take immediate steps when a hazard occurs (GX 355, pp. 60–64). On the other hand, a watchman may be asleep when an intruder enters the premises or when a fire breaks out; a burglar alarm ringing in a deserted street at 2 A.M. may not bring the police; an alarm signal recorded in the police station may not result in an immediate dispatch of an officer to the area (GX 352, p. 47, GX 346, R. 2986; GX 7,

[1] Where there is no record reference to a government exhibit, the page cited refers to the unprinted portions of the exhibit. Most of such references are to depositions.

R. 1182–1184; GX 333, R. 2838). Furthermore, an essential element of central station service is insuring that the system is in proper condition (GX 278, R. 2143–2145). The companies themselves make frequent tests and inspections of the equipment (GX 1, R. 795; GX 317, R. 2362–2363; GX 355, p. 62); indeed, insurance underwriters require them to do so (see below). The users of other types of service, however, may not properly maintain them; ADT frequently discovered, when asked to survey property for central station service, that other protective service on the premises had been kept so poorly that it could not adequately perform its function (R. 531–532).

The insurance industry recognizes the superiority of central station protective service. Its national trade associations have established laboratories to test the equipment used in providing such service, and have adopted detailed standards for the installation and operation of approved central station service (R. 790, 848, 1024). Both the central station and the particular installation must be approved before the service is considered "accredited" (R. GX 352, pp. 10–11; GX 348, p. 22; GX 317, R. 2357–2359); obtaining such approval for a central station often is a lengthy and exacting procedure (GX 317, R. 2357; GX 320, R. 2482; GX 328, R. 2643). After a central station has been approved, the insurance underwriting agencies periodically inspect the station and its operations, and withdraw approval if the central station has not met

the underwriters' standards for the installation, maintenance and service of detecting, transmitting and monitoring devices (GX 352, pp. 13–20; GX 348, pp. 23–24; GX 333, R. 2833–2834, GX 317, R. 2358–2359).

Subscribers to accredited central station service—*i.e.*, that which has been approved by the insurance underwriters—receive reductions in their insurance premiums that are significantly higher than the reductions received by the users of other types of protection service (R. Fdg. 5, 748). For example, a subscriber to an accredited central station burglary system may obtain twice the discount that the user of an approved local burglar alarm obtains—70 percent as against 35 percent (GX 5, R. 1018). Operators of central station protection businesses found that until they became accredited there were many sources of protection service business for which they could not compete (GX 320, R. 2437; GX 326, R. 2562; GX 329, R. 2659; GX 336, R. 2877–2878; GX 341, R. 2940; GX 343, R. 2967–2968; GX 351, R. 3036, 3047; GX 362, R. 3224; GX 160, R. 1591); some merchants apparently have found it difficult to obtain adequate insurance coverage without such service (see GX 289, R. 2187; GX 320, R. 2473–2474; GX 340, R. 2932–2933; GX 318, R. 2407; GX 336, R. 2877–2878; GX 339, R. 2919; GX 357, R. 3149; GX 343, R. 2972–2973). The distinctions between accredited central station protection service and other forms of protection are further developed in the argument on the relevant market, *infra*, pp. 51–62.

B. THE DEFENDANTS.

Grinnell is directly engaged in manufacturing and selling plumbing supplies and fire sprinkler systems (R. 670) and, through the defendant alarm companies which it controls by stock ownership, in the protection service business. It owns 76 percent of the stock of ADT, 89 percent of the stock of AFA, and 100 percent of the stock of Holmes (R. 669; GX 316, R. 2338). ADT provides both burglary and fire protection services (GX 312, R. 2268–2273); Holmes limits itself to burglary service (GX 312, R. 2268–2273); and AFA supplies only fire protection service (R. 634).[5] See *infra,* pp. 13–16 for discussion of the agreements which resulted in these limitations on the business of the latter two companies.

In 1961, accredited companies engaged in the central station service business grossed $65 million (GX 312, R. 2268). ADT, Holmes and AFA are the three largest companies in the business (GX 312, R. 2274–2278). In 1961, ADT had 73 percent of such business (GX 312, R. 2268), which it did through 121 central stations located in 115 cities throughout the country (GX 304, R. 2217–2219). In 92 of those cities there were no other accredited central service stations (GX 304, R. 2216–2222). Holmes had 12 percent of that business, which it did through 12 central stations—9 in New York City, 2 in Philadelphia and 1 in Pittsburgh (GX 304, R. 2220; GX 312, R. 2268). AFA had two percent of the business, done through three central stations located in Boston, New

[5] AFA has one burglar alarm subscriber (GX 312, R. 2268–2273).

York and Philadelphia (R. 634; GX 312, R. 2268).[6] Thus, in 1961 the three defendant alarm companies which Grinnell controls had together more than 87 percent of the business (R. 741; GX 312, R. 2268).[7]

C. THE METHODS BY WHICH THE ALARM COMPANY DEFENDANTS ACQUIRED AND MAINTAINED THEIR MARKET SHARES OF THE ACCREDITED CENTRAL STATION PROTECTION BUSINESS

1. ACQUISITIONS

Since 1907 ADT has purchased the stock or assets of 27 companies engaged in the business of providing burglar or fire alarm service (GX 9–32, R. 1187–1235; GX 40, R. 1251; GX 296, R. 2193). Holmes has acquired the stock or assets of three burglar alarm central station companies in New York City (GX 37–39, R. 1236–1251). In the case of seven of these acquisitions (six by ADT and one by Holmes) the officials of the acquired companies agreed not to engage in the protective service business in the area that they had served for periods ranging from 5 to 20 years and, in two instances, permanently (ADT: GX 9, R. 1190; GX 12, R. 1195; GX 26–1, R. 1212; GX 26–2, R. 1214; GX 30–1, R. 1230; GX 32, R. 1235; GX 40,

[6] In 1961 the three alarm company defendants together had 136 accredited central stations; non-defendant alarm companies had 34 such stations (DX D75(b), R. 4507–4508). The number of independent accredited central stations, which was 12 when Grinnell first acquired control of an alarm company in 1949, had increased to 41 by 1963 (*ibid.*).

[7] Between 1957 and 1961 their total share of the business had declined from 91.33 percent to 87.85 percent (GX 312, R. 2268).

R. 1252–1253. Holmes: GX 39, R. 1250–1251).[8] Following four of such acquisitions, ADT dismantled the plants of the acquired companies (GX 13, R. 1196; GX 30–1, R. 1229–1230; GX 313, R. 2292).

After Grinnell had acquired control of the alarm company defendants (see *infra,* pp. 28–30), the latter continued to attempt to acquire accredited central station companies. Between 1955 and 1961 the defendant alarm companies sought to acquire at least eight such companies, including four of the five largest nondefendant companies in the business.[9] When this suit was filed each of those defendants had an outstanding offer to purchase one of the four largest nondefendant companies (ADT: GX 357, R. 3143–3135. Holmes: GX 54, R. 1290–1294. AFA: GX 339, R. 2907–2908; GX 312, R. 2274).

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[8] Under the agreement by which ADT in 1938 acquired from the Pacific Fire Extinguisher Company the latter's signaling protective business "which lies in that portion of California south of Bakersfield and south of San Luis Obispo," the seller agreed to withdraw from that business in that area and not to reenter it (GX 40, R. 1252–1253). In 1956 or 1957, when Pacific Fire Extinguisher submitted a bid to provide protective service "on a job just on the outskirts of San Luis Obispo," an ADT representative informed the company that under the 1938 agreement he could not bid in the area and told it "to get the dickens out of there" (GX 331, R. 2780). ADT obtained the contract (GX 331, R. 2881). See also GX 41, R. 1254.

[9] ADT: GX 43, R. 1267–1270; GX 44, R. 1270; GX 46–49, R. 1275–1284; GX 50–53, R. 1284–1290; GX 351, R. 3057–3058; GX 357, R. 3131–3136; GX 361, R. 3189–3192. See, also, GX 45, R. 1271–75.

Holmes: GX 54, R. 1290–1294.

AFA: GX 55–57, R. 1295–1304; GX 339, R. 2904–2908.

GX 312, R. 2274, shows the size of the various companies that the alarm company defendants sought to acquire.

2. AGREEMENTS BY THE DEFENDANTS LIMITING THE TERRITORIES TO BE SERVED AND THE SERVICES TO BE PROVIDED

a. *The burglar alarm agreement.* In 1906 ADT and Holmes, which were then unaffiliated, entered into a written contract under which (1) ADT transferred to Holmes its burglar alarm business in a major portion of the Middle Atlantic States,[10] and agreed to refrain forever from engaging in that business in that area; and (2) Holmes transferred to ADT its watch signal business, and agreed to confine its business to that area and to limit its activities to burglar alarm service and night watch service for financial institutions (GX 61, R. 1312–1315).

The agreement was terminated in 1947 (D. Ex. E52, R. 4561, D. Ex. E53, R. 4561–4562). The parties modified it several times to permit ADT to provide burglar alarm service in specified cities (GX 62–68, R. 1315–1338). Some of these modifications required ADT to pay Holmes a specified percentage of the gross receipts of such business, and authorized Holmes to reenter the area after ten years, in which event it could purchase the business from ADT and the latter would then refrain from engaging in burglary alarm service in the area (GX 63–64, R. 1322–1335).

In 1961, fourteen years after the agreement had been terminated, Holmes still restricted its business to burglar alarm service, and operated only in those areas which had been allocated to it under the 1906

[10] New Jersey, Maryland, Delaware, eight counties around New York City, part of Connecticut, and seven counties in Pennsylvania embracing Philadelphia and Pittsburgh (GX 61, R. 1313).

agreement (Fdg. 52, R. 758–759, GX 312, R. 2274; GX 304, R. 2220). Similarly, ADT continued to refrain from supplying burglar alarm service in those areas that had been allocated to Holmes. Thus, as recently as 1961 ADT, upon surveying a plant in Pittsburgh (a Holmes area) "for ADT Central Station Fire Alarm, Burglar Alarm, and Heating Supervision," quoted only upon the first and third of these services. It explained that since "ADT does not furnish burglar alarm protection within the city of Pittsburgh," it had requested Holmes, "an affiliate of ADT, to make a survey for central station burglar alarm protection," the results of which it submitted. GX 74, R. 1348. For other instances in which, after the agreement was terminated, ADT turned over to Holmes business in an area which the agreement allotted to the latter, see GX 70, R. 1341 and GX 77, R. 1352. See, also GX 71, R. 1343, relating to a 1959 dispute between Holmes and ADT over which company was entitled to solicit burglar alarm business in an outlying area of Philadelphia.

b. *The fire alarm agreements.* In 1907 Grinnell (then known as General Fire Extinguisher Company, R. 674), ADT, AFA and the Automatic Fire Protection Co. ("Automatic") entered into a series of complex agreements (GX 80–A–80–C, R. 1362–1386), the effects of which were:

1. AFA received the exclusive right to provide central station sprinkler supervisory and waterflow alarm (see *supra,* p. 7) and automatic fire alarm service in New York City, Boston and Philadelphia, and agreed not to provide burglar alarm service in those

cities or central station service elsewhere in the United States.

2. Automatic received the exclusive right to provide central station sprinkler supervisory and waterflow alarm service everywhere else in the United States except for the three cities in which AFA received that exclusive right, and agreed not to engage in burglar alarm service.

3. ADT received the exclusive right to render burglar alarm and nightwatch service throughout the United States. (Under ADT's 1906 agreement with Holmes, however, it could not provide burglar alarm services in the areas in which it had given Holmes the exclusive right to do so.) It agreed not to furnish sprinkler supervisory and waterflow alarm service anywhere in the country and not to furnish automatic fire alarm service in New York City, Boston or Philadelphia (the three cities allocated to AFA). ADT agreed to connect to its central stations the systems installed by AFA and Automatic.

4. Grinnell agreed to furnish and install all sprinkler supervisory and waterflow alarm actuating devices used in systems that AFA and Automatic would install, and otherwise not to engage in the central station protection business.

5. AFA and Automatic received 25 percent of the revenue produced by the sprinkler supervisory waterflow alarm service which they provided in their respective territories; ADT and Grinnell received 50 percent and 25 percent respectively, of the revenue which resulted from such service.

6. The agreements were to continue until February, 1954.

The agreements continued substantially unchanged until January 1949, when ADT purchased all of Automatic's rights thereunder for $13,500,000 (GX 42, R. 1255–1267).[11]

Under the 1907 agreements Grinnell retained title to the actuating devices it supplied to AFA and Automatic (R. 568). After ADT in 1949 had acquired Automatic's rights under the agreements and as the 1954 termination date approached, there was a series of discussions between Grinnell and ADT about the future relationship between the companies. Grinnell apparently wanted to continue to supply the equipment in return for a share of the revenues produced therefrom, but ADT's counsel contended that the arrangement was an exclusive dealing contract that was illegal under the antitrust laws (GX 87, R. 1425–1430). The companies considered the possibility of ADT purchasing the existing installed devices from Grinnell, but disagreed as to the basis therefor; Grinnell contended that it had "other terminal rights beyond simply device ownership" (GX 87, R. 1425, 1427; GX 88, R. 1430–1433).

The dispute was settled in 1952 when Grinnell agreed to accept 17.2 percent of the annual revenues

[11] In 1913, ADT assumed Automatic's obligations under the 1907 agreements. ADT acquired Automatic's existing subscriber contracts, and the obligation to solicit, and furnish transmitters for, all sprinkler supervisory and waterflow alarm contracts obtained within Automatic's territory. Automatic did not completely relinquish its right to share in future and existing revenues produced in its territory, but agreed to accept a reduced share thereof. (GX 81, R. 1387–1395.)

produced by systems that were installed prior to February 18, 1954, and abandoned any claim to a share of the revenue of any system installed after that date (GX 89, R. 1434–1470). In the next year Grinnell agreed to sell the actuating devices then in service to ADT and AFA (GX 113–114, R. 1523–1528).

After the 1907 agreements had expired in 1954, AFA continued to recognize and follow the previous division of territories. Thus, in 1956 it referred a request for an estimate to install central service fire alarm service "to our associated company, A.D.T.," "[s]ince this building is located in Nassau County" (which was an area where ADT had the exclusive right to provide such service under the 1907 agreements) (GX 97, R. 1518). See also, GX 246, R. 2090.

On February 18, 1954, the date on which the 1907 agreements expired, ADT and AFA entered into a contract providing for the continued sharing of revenues on substantially the same basis as theretofore had existed (GX 84, R. 1398–1402). In 1959 ADT complained to AFA that the "contract is inequitable, since AFA enjoys a greater participation in the contract proceeds than can possibly be justified from its prescribed contribution which is limited to contract negotiations and renewals and provisions of the minimum requirements of transmitters and manuals" (GX 93, R. 1473). ADT brought its complaint to the attention of Fleming, the president of Grinnell (which by that time controlled both com-

panies). In response, the president of AFA pointed out to Fleming (GX 94, R. 1483–1485):

> It seems to us that ADT is quite wrong in assuming that Automatic's "prescribed contribution" is limited to "contract negotiations and renewals and provision of the minimum requirements of transmitters and manuals."
>
> We must take the position that the geographic restrictions placed upon us plus the requirement that we confine our activities to sprinkler and fire alarm services exclusively, since 1907 and presumably into the future, has definitely retarded our expansion in the past to the benefit of ADT growth. Automatic is still denied the right of future expansion into existing and new fields of protection services born of normal business progress. Surely Automatic's true contribution goes far beyond the "prescribed contribution." Automatic's contribution must also include the many things which helped make ADT big, and continues to do so. If these restrictions are of no value to ADT, and therefore need not even be recognized by them, surely they should be completely removed.

c. *Other restrictive agreements.* In 1954 Grinnell and ADT renewed an agreement with Rhode Island Electric Protective Company under which the latter (1) received the exclusive right to render central station service within Rhode Island at prices no lower than those of ADT, (2) agreed to use certain equipment supplied by Grinnell and ADT and to share its revenues with those companies (GX 128-130, R. 1528–1541).

In Washington, D.C., ADT had an informal "agreement" or "understanding" with the Federal Engineering Co., a competing central station company, "that we would not solicit each others accounts" (GX 360, R. 3173–3175; GX 320, R. 2432, 2440–2442).

3. ADT'S PRICING PRACTICES

The price which ADT quotes for its central station service consists of two elements: an installation charge, and an annual service charge (D. Ex. E–1, R. 3246; D. Ex. E–2, R. 3249). The company has a schedule of so-called minimum basic rates, which it seeks to obtain on all contracts (GX 212, R. 2013, 2014, 2017–2018; GX 232, R. 2064, 2067). The company's actual practice, however, is to permit substantial reductions from such standard rates where necessary to meet competition. The company authorized its district sales managers to reduce the standard installation charges by up to 40 percent and standard annual service charges by up to 20 percent when faced with competition (R. 613; GX 212, R. 2013, 2015, 2018).

ADT required its salesmen to submit a form (which was headed "Competition Report") showing all deviations from minimum basic rates (R. 405). Hundreds of such forms are in the record; such forms, together with another contract reporting form which also states any deviations from the minimum basic rates and the reasons therefor, occupy more than 300 pages of the printed record (GX 175–203, R. 1629–1959). They show numerous instances in which, because of competition, ADT made the installation with-

out charge, reduced the annual service charge by 50 to 70 percent, or even sometimes accompanied such reduction in annual charges with a free installation.[12] Many of the reports stress the importance of not allowing a competitor to gain a foothold with the particular customer or in the particular area.

Among the explanations for such reductions have been: "Although this is a poor percentage figure, it keeps Merchants Police out of an area where the other * * * subscribers are presently paying us over 12,000.00 per year" (R. 1848); "an attempt to keep competition from invading this subscriber whom we serve at other locations" (R. 1646); "to prevent approach by our competitor who is seemingly interesting himself in this type of business" (R. 1651); "Call's Signal Service is attempting to secure business in this area" (R. 1661); "Our competitor * * * is actively attempting to secure business in Brookline" (R. 1662); "it is recommended that this be accepted so as not to allow Morse to get a foothold in any of these department stores" (R. 1721); "In order to keep competitor out of this growing chain" (R. 1749); "In view of the fact that this is a large downtown location where we have a rather large tour system,

[12] Free installation—R. 1649, 1658, 1681, 1685, 1689, 1700, 1702, 1703, 1705, 1711, 1716, 1717, 1736, 1739, 1740, 1748, 1751, 1755, 1765, 1766, 1801, 1802, 1810, 1864, 1880, 1885, 1888, 1892, 1894, 1908, 1910, 1911, 1912, 1914, 1936.

50–70 percent off annual charges: R. 1646, 1656, 1663, 1664, 1706, 1708, 1732, 1741, 1743, 1754, 1758, 1760, 1778, 1788, 1792, 1797, 1800, 1803, 1844, 1853, 1856, 1859, 1860, 1861, 1870, 1871, 1882, 1937, 1942.

Free installation and 50–70 percent off annual charge: R. 2090 (AFA), 1643, 1815, 1913, 1658, 1705, 1740.

we felt it necessary to secure this account at any cost" (R. 1757); "This location is right in the heart of Downtown Denver, and this is the ideal prospect that our Competitor looks for to display her exterior signs * * *" (R. 1773); "Job was taken below basic to prevent competitor from gaining a foothold in area served by Oxford Telephone Exchange * * *" (R. 1813); "this is the first plant to be erected in the new Harvlan Industrial Tract * * * and it would be a distinct advantage to our competitor to extend its service to this area" (R. 1820); "We were most anxious to block Robinson's first move into Camden * * *" (R. 1907); "Competitor is very anxious to get a foothold in this building of wholesale jewelers * * *" (R. 1922); "we * * * have been trying not to let this Competitor make any further inroads into the territory of Virginia" (R. 1945).[13]

A number of these reports also stressed that although the minimum basic rates had not been obtained, the effect of obtaining a five-year contract was to keep competitors out for that period. "This contract has been taken for a five year period because of competitive threats which we have now locked out for another five year period" (R. 1629); "In order to keep competition out of here, we have taken the

[13] See, also, GX 214, R. 2021; GX 218, R. 2025, 2027 ("Mr. Lewin has started the same kind of campaign which involves present and future ADT subscribers, exactly the same way as the Merchants Police in Milwaukee successfully pursue. Rather obviously, unless we immediately proceed to meet him right at the starting point with a flexible price program, such as we belatedly put in effect in Milwaukee, it is going to be impossible to successfully contain his operations").

agreement for a five year period" (R. 1644); "We have taken this contract for a five year term at the prevailing rate in order to lock out any competitive approach" (R. 1645); we "felt it was better to renew these contracts for a further five-year period at 15% less rental than to take a chance to lose them to our competitor" (R. 1655); "It is recommended this be accepted as written for five year term to keep competitors out" (R. 1712); "it is recommended that agreement be accepted for five year period to preclude the possibility of our Competitor re-entering the picture" (R. 1779). To the same effect, see, also, R. 1662, 1713, 1714, 1738, 1777, 1780, 1845 1849.

During the same period that ADT substantially cut its charges to meet competition, it renewed a number of contracts at substantially increased rates in cities where it had a monopoly of accredited central station business (R. 1823–1828 (Louisville); R. 1831–1838 (Memphis); R. 1872–1878 (New Orleans); R. 1895–1900 (Omaha); R. 1915–1921 (Portland, Oregon); R. 1928–1934 (Seattle)). Where it faced competition, however, it renewed at lower rates (R. 1695, 1749, 1909, 1913; see, also, GX 270, R. 2124). As ADT's vice-president stated, in explaining why ADT had reduced its price on the renewal of the contract for R.K.O. Pictures, "it was decided that if this was the best deal possible we would take it in order to keep Morse out of the motion picture studio business. * * * If the Morse people got R.K.O. studios, one of the majors, they would have their foot in the door, so to speak, and would have a weapon to use in soliciting other studios" (GX 265, R. 2118).

GX 222 (R. 2033–2038) sets forth the percentages of minimum basic rates, both annual and installation (the latter being described as "Advance Service Charges"), that ADT obtained for each of the years 1957 through 1961 in each of its central stations. It shows that ADT repeatedly has obtained significantly lower percentages of its standard charges in those cities where it has accredited central station competition than in those cities where it has a monopoly of such business. We have set forth in an appendix various charts which compare the percentages for cities where ADT has such competition with cities where it does not. The extent of the differences naturally varies from city to city; the significant thing is that ADT consistently has been able to secure a much higher percentage of its minimum basic rates where it is free from competition. As an extreme example, in Dallas, where it faced competition, during those years ADT obtained from 72 to 79 percent of its standard annual charges, and from 28 to 51 percent of its standard installation charges. In Salt Lake City, however, where it had no competition, the percentages for the same years ranged from 95 to 104 of standard service charges and from 96 to 105 of standard installation charges.

GX 222 further shows that of the 178 instances in which ADT was able to collect 100 percent or more of the minimum basic installation or service rate in a particular city in a particular year, only two occurred in a city where ADT faced accredited competition—Newark, New Jersey, where it received 101.1 percent of annual charges in 1957 and 100.7

percent in 1958 (R. 2034). Similarly, of the 79 instances in which ADT obtained between 99 and 99.9 percent of its minimum basic rates, only four were in cities where it faced accredited competition—installation charges in Albany, New York in 1958, service charges in Minneapolis in 1959, service charges in Washington, D.C. in 1958, and service charges in Peoria, Illinois in 1961 (R. 2033–2035, 2037).

4. THREATS OF RETALIATION AGAINST ACTUAL AND POTENTIAL COMPETITORS.

On occasion ADT's representatives have threatened retaliation against firms who contemplated inaugurating central station service. For example, in 1956 ADT found out that Republic Alarm Co., a firm in San Jose, California engaged in the telephone answering business, was "contemplating opening a central station" (GX 340, R. 2919, 2928). Walter Dooley, the assistant to the general sales manager of ADT, visited Kenneth McFarlan, Jr., one of the owners of Republic, in San Jose, and inquired "about the possibility of buying us out" (*ibid.*). When McFarlan told him the business was not for sale, Dooley stated that it "wouldn't be a good idea" for Republic to open a central station, "because A.D.T. was going open their central station, and that San Jose just wasn't large enough for two central stations" (*ibid.*).

> He went on to explain that the way A.D.T. operated, being a big company the way they were, that they could operate virtually any way they wanted to within any local area, by virtue of spreading profits from other areas to the particular area in question, and that in San

Jose, for example, they could operate well below their normal rates for whatever period of time it was necessary to eliminate the competition.

In fact, he said, "I'll go so far as to say that you open your central station and we'll open our central station, and in two years I'll guarantee you there will be only one." [*ibid.*]

When Dooley returned to ADT's main office in New York City, he reported that although McFarlan had refused to consider selling the company, "It is reasonable to assume that after our lengthy meeting he will approach this expansion with a certain amount of apprehension which may result in the action being delayed" (GX 143, R. 1555–1556). Republic never opened an accredited central station in San Jose (GX 304, R. 2216–2222), but about four years later ADT did (GX 313, R. 2283, GX 303, R. 2208).

Mr. Oberlander, the president of Protection Alarms, Inc., located in Peoria, Illinois, testified that shortly after his firm opened a central station in Peoria, he met with Fryxell, ADT's district plant superintendent, DeSchane, its district sales manager, and another ADT representative (GX 342, R. 2943, 2945). DeSchane, according to Oberlander, "indicated that he felt there wasn't enough business in Peoria for * * * two central station alarm companies * * * and he tried to discourage me from going into business (*id.*, R. 2945–2946); "They stated that Peoria is just one city to them and they didn't have to make a profit in Peoria but they had * * * a hundred and sixty or hundred and seventy cities, that had alarm offices and they didn't have to make any money in the Peoria

Office, that they could just ruin me economically" (*id.*, R. 2948; see, also, *id.*, R. 2956). After this meeting the ADT representatives reported to the company's general sales manager that they had "endeavored to point out [to Oberlander] the hazards and pitfalls encountered in this type of business" (GX 144, R. 1556, 1557).

After The Michigan Still Alarm Company in 1952 had obtained a contract from an ADT customer in Detroit, ADT's district sales manager told Michigan's vice-president that "we are not going to stand for you taking business like this away from us"; that "he could go to his New York office and get them to put a million dollars in this town—this is the words he used—and it will run us right out of business" (GX 351, R. 3035, 3052–3053, 3057). Similarly, Dooley, the assistant to the general sales manager of ADT, told the president of the Denver Burglar Alarm Company, which had just obtained a contract with an American Can Company plant: "'You know, Sarah,' he says, 'you'd better give up that contract you have on American Can Company.' and I didn't answer him. And he says, 'I'm warning you.' He says, 'We can make it pretty tough for you'" (GX 333, R. 2786, 2815). In 1955 ADT assigned a new district manager to the area, who told the president of Federal Engineering that that company "had been obtaining a larger percentage of new accounts than we as a young company in the central business were entitled to" (GX 320, R. 2432, 2446).

5. OPENING NEW CENTRAL STATIONS TO DISCOURAGE COMPETITION.

Between 1952 and 1961 ADT opened 13 new central stations (GX 313, R. 2283). One factor that sometimes influenced ADT to do so was the effect such opening would have upon competitors. For example, in recommending in 1960 that ADT open a central station in Orange County, California, the top ADT representatives in that area pointed out that "[w]ith a central station in this area, we will discourage any of our competitors from opening up a central station" (GX 150, R. 1567, 1569). In the same year they also recommended opening a central station in the San Fernando Valley area of Los Angeles, which "will discourage any of our competition from opening a central station in the area, as it is now likely that one or the other, seeing the business that is to be had, will soon open a central station there" (GX 160, R. 1587, 1591). In the previous year, two high ADT officials, in recommending the opening of a central station in San Jose, California, noted that "[s]uch a move will place any potential competitors at a decided disadvantage," and that opening the station there was appropriate "since there is the possibility of a competitor establishing a central station at this city" (GX 151, 152, R. 1570, 1571). One of the considerations which led ADT officials to recommend in 1959 that a central station be established in New Brunswick, New Jersey, was that "the establishment of the proposed facility would probably discourage competition from doing likewise thus placing us in the premier position to succeed in this

attractive area" (GX 157, R. 1581, 1583). See, also, GX 154, R. 1575; GX 155, R. 1576; GX 158, R. 1583, 1584–1585; GX 161, R. 1592–1594).

D. GRINNELL'S ACQUISITIONS OF CONTROL OF THE ALARM COMPANY DEFENDANTS.

1. AFA.

As previously stated (*supra*, p. 16), when the 1954 termination date of the 1907 fire alarm agreements approached, Grinnell and ADT had a series of discussions as to the future relationship of the companies. During these negotiations Fleming, the president of Grinnell, stated that Grinnell was not prepared "to go completely out of the Supervisory business in 1954 even if no agreement were reached with the A.D.T. Company * * * and were prepared now to go into the central station business generally, including both Supervisory, Burglary, etc. service if this became necessary, although we would still much prefer to renew our arrangements with the A.D.T. on a fair basis" (GX 88, R. 1430, 1433).

Grinnell purchased 51 percent of AFA's stock in 1949 for $1,300,000 (R. 674).[14] Fleming testified at the trial that it made the purchase "primarily because we felt it was a good investment. We knew it was a depression-proof business" (R. 674). He further testified (*ibid.*) that "[w]e were negotiating with ADT for an extension of the 1907 agreement. We knew that if we did not reach an agreement, Grinnell's participation would be cut down. We

[14] AFA was Grinnell's largest stockholder at the time (R. 674).

wanted to replace that income with other supervisory income if we could."

2. HOLMES.

Grinnell acquired 100 percent of the stock of Holmes from the New York Telephone Company in 1950 for $4,256,000 (R. 674–675). Fleming testified (R. 676) that ADT bought Holmes as an investment—"it was a depression-proof business"—"[b]ut we also bought it so that we would know something about or have someone in the organization who knew something about the burglar alarm business so we could compete with ADT."

3. ADT.

Grinnell purchased 62 percent of the stock of ADT from Western Union in 1953 for $12.5 million (R. 677-678). ADT first heard about the possibility of such purchase when a business broker called Fleming and advised him that the stock was for sale (R. 677).

Following a public announcement of the pending acquisition, the Department of Justice requested information from Grinnell concerning the operations of the two companies, since the acquisition "raise[d] certain questions" under the antitrust laws (DX J–52, R. 4205; R. 679). Upon receipt of this request, Grinnell decided to abandon the acquisition unless it "could get a clearance from the Department of Justice" (R. 680). Grinnell supplied the information (R. 681; DX J–56, R. 4209), and ten days later received a letter from the Department acknowledging receipt of the information and thanking Grinnell for its coop-

eration (DX J-55, R. 4208). Upon receipt of this letter, Grinnell's counsel advised Fleming that the Department had granted a "clearance" (R. 681), and Grinnell made the acquisition.

E. THE DECISION AND DECREE OF THE DISTRICT COURT.

The district court held that the alarm company defendants had committed *per se* violations of Section 1 of the Sherman Act by agreeing to divide territories, allocate customers and fix minimum prices, and by manipulating their prices to forestall competition (R. 760–761); that although those agreements are no longer legally effective, "their influence in forming business practices remains to a discernible extent" (Fdg. 51a, R. 758), since the "defendants, including Grinnell, continued most of the arrangements once founded on these unlawful legal instruments" (R. 761); that the relevant product market for determining whether the defendants had monopoly power was "accredited central service protective systems operated by largely automatic devices" (Fdg. 36, R. 754); that the relevant geographic market was the entire country (Fdg. 37–38; R. 754–755); that the defendants had attempted and conspired to monopolize, and had monopolized, "the national market in the accredited CSPS industry," in violation of Section 2 of the Sherman Act (R. 761); and that "Grinnell's acquisition of so high a percentage of stock of the companies engaged in the monopolization, and Grinnell's direction of the policies of the 4 companies as a whole toward the maintenance of the monopolization constituted a violation of Section 2" (R. 761–762).

The court stated (R. 746) that "once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of § 2"; and that the defendants' "overwhelming * * * share of the CSPS market * * * rests not on the skill, efficiency, and foresight of defendants, not even on their neutrally normal business methods, but on violations of *per se* rules governing restraints of trade and on acquisitions indicating that that growth was a response to external grasp, not to internal grip" (R. 762).

The decree of the district court (R. 768–769):

1. Enjoins the defendants from restraining, or attempting or conspiring to restrain, or from attempting or conspiring to monopolize, or from monopolizing "the national market of insurance accredited central station protective service." "To make this provision effective" each of the alarm company defendants is directed to file with the Antitrust Division of the Department of Justice any standard price lists it may adopt and every written or oral quotation deviating therefrom.

2. Enjoins the defendants from acquiring the stock, assets or business of enterprises in that market.

3. Directs Grinnell to dispose of its stock in each of the alarm company defendants, through either sale or distribution to Grinnell stockholders or some combination or reasonable variation of those methods.

4. Prohibits the defendants after April 1, 1966, from employing in any capacity Fleming, the president of Grinnell.

In entering this decree the court rejected without explanation various provisions which, during the pretrial procedings, the government had proposed as appropriate relief if the court held in its favor. The defendants had agreed to two of these provisions in the exact form the government had proposed, and had accepted the substance of other proposals but disagreed with their breadth and details. See the argument on relief *infra*, pp. 83–85, 87–94.

SUMMARY OF ARGUMENT

I

A. The district court correctly found that the relevant product market for determining whether the defendants have monopoly power is accredited central station service. The offense of monopolization comprises two elements: (1) the possession of monopoly power and (2) the willful acquisition or maintenance of that power. The existence of monopoly power—the power to control prices or exclude competition (*United States* v. *duPont & Company,* 351 U.S. 377, 391 "the *Cellophane* case")—ordinarily may be inferred from the possession of a predominant share of the market. In the present case, the defendants had 87 percent of the accredited central station business and if that business may appropriately be considered as a market there can be no doubt that the defendants have monopoly power there. *United States* v. *Aluminum Company of America,* 148 F. 2d

416, 429 (C.A. 2) (*"Alcoa"*). The critical question, therefore, is that of the definition of the relevant market.

In *Cellophane* this Court held that the relevant market for determining the existence of monopoly power is "comprised of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered" (351 U.S. at 404). We believe that this standard, properly applied, is a strict one; *i.e.*, a substitute product is to be included in the relevant market only where the distinctions between the products are sufficiently minor from the consumer's point of view that he is relatively indifferent as to which product he uses. This understanding of the content of the *Cellophane* standard is required by the very purpose of the prohibition against monopolization—that is, to protect the economy against concentrations of economic power that eliminate or disrupt the play of normal competitive forces in the market.

The district court properly applied the *Cellophane* test in concluding that accredited central station protective service is a relevant market, and the findings upon which that conclusion rests are supported by the record. Although various types of central station service protect against different hazards, the court was justified in grouping all forms of central station service into a single market. Central station companies generally provide all forms of protection, and the product involved essentially is hazard protection through the means of a central warning system.

Similarly, the record supports the district court's finding that there are sufficiently significant differences between accredited central station service and other forms of protective service that, "price, use and qualities considered," these products are not "reasonably interchangeable" for the "purposes for which they are produced" (*Cellophane*). Accredited central station service has two exclusive features which make it significantly superior to all others in terms of its purpose of providing a warning against hazards. It is the only service that (1) automatically discloses any defect in the hazard-detecting equipment that renders it ineffective, and (2) assures that trained personnel will always be available to take immediate necessary action in case of an alarm. Non-accredited central station service is essentially non-perfected central station service and is a relatively insignificant aspect of the business; operators of non-accredited stations are unable to bid for many accounts; and most such operators become accredited or intend to do so as soon as they can meet the standards which the insurance underwriters require for accreditation. The lack of "reasonable interchangeability" between accredited central station service and other forms of protection service is shown, among other things, by the substantially larger discounts that the insurance underwriters give for the former, the fact that when customers change the type of service the "preponderant shift" (Fdg. 13, R. 749) is from the other services to accredited central station protection, and the numerous respects in which particular types of service differ significantly from and are inferior to central station service.

2. The district court also correctly held that, even though a central station operates within a narrow geographical area, there exists a national market in accredited central station protective services (Fdg. 38, R. 754). ADT, which in 1961 had 73 percent of the business done by accredited central station companies, plans and conducts its activities on a nationwide basis. It sets uniform prices on a system wide basis; it negotiates with the home offices of large multistate firms contracts covering numerous installations; it manufactures and distributes to its operating companies a substantial amount of equipment which they use in providing service; it engages in national advertising; and it conducts substantial research for the entire system.

B. The record shows that Grinnell, by acquiring controlling interests in the three alarm company defendants over a four-year period, put together a combination to achieve and perpetuate monopoly power, and that the alarm company defendants acquired and maintained that power by restrictive and exclusionary practices.

1. Since early in the century the defendants had been parties to restrictive agreements which preempted for each alarm company defendant a segment of the market where it could expand free from the competition of the others. As the 1954 termination date of some of those agreements approached, a dispute developed between Grinnell and ADT over the future business relationships between the companies, and Grinnell contemplated the possibility of itself entering the central station business (which it was pre-

cluded from entering by the restrictive agreements) if it could not resolve the dispute. Indeed, one of the reasons for Grinnell's purchases of AFA and Holmes was to enable it to compete with ADT. Grinnell, by acquiring control of the three alarm company defendants, eliminated the outbreak of competition that was expected upon termination of the restrictive agreements, and perpetuated the very restraints that had enabled the alarm companies to gain an overwhelming share of the market. The combination thus perpetuated the monopoly power that can exclude competitors and fix prices, and the formation of such a combination constitutes monopolization. *Alcoa, supra.*

2. The record in this case shows that the monopoly power that the combination possessed was not "thrust upon" the defendants (*Alcoa,* 148 F. 2d at 429), but was the result of restrictive and exclusionary practices that were used both to derive and to maintain the power. The alarm company defendants operated for almost 50 years under formal agreements dividing up the country into exclusive preserves; such agreements long have been illegal *per se* under Section 1 of the Sherman Act. Although these agreements terminated by 1954, the district court correctly ruled (R. 761) that the "defendants, including Grinnell, continued most of the arrangements once founded on those unlawful legal instruments." Other methods by which alarm company defendants have acquired and maintain their monopoly power include: (1) the acquisition of a substantial number of protection service companies; (2) the use of discriminatory pricing to

hinder and exclude competitors; and (3) the inclusion of terms and conditions in service contracts that had the effect of excluding competitors from the market.

II

Before trial, in accordance with the court's instructions, each side filed a brief setting forth its views with respect to the relief that would be appropriate if the government prevailed. The government submitted a number of detailed proposals, some of which the defendants accepted in principle but disagreed with as to details, and two of which the defendants accepted in the identical form the government proposed. The district court, without explanation, gave substantially less relief than the government had requested and, indeed, than the defendants had acknowledged would be appropriate. The court in general terms enjoined the defendants from violating the Sherman Act; ordered the alarm company defendants to file with the Department of Justice any deviations from their standard price lists; prohibited the defendants from acquiring any interest in any central station business; directed Grinnell to divest its interests in each of the alarm company defendants; and enjoined any of the defendants from employing the president and chairman of the board of Grinnell, Mr. Fleming. The decree is inadequate, in four respects, and appears inappropriate in other respects.

A. 1. The keystone of the combination's unlawful monopoly power is the 73 percent of the market that ADT possesses. The mere dissolution of the combination through Grinnell's divestiture of its interests

in the alarm company defendants will not strike at the root of that power; what is required is some divestiture of ADT's market power itself.

2. Among the means by which ADT acquired and held its large share of the market have been requiring subscribers to sign five-year contracts and retaining title to the protection service equipment installed on subscribers' premises. In order to remove the barriers to entry that these provisions impose, some limitation upon them is necessary.

3. In the district court, the government proposed, and the defendants accepted, a provision requiring the defendants to sell upon nondiscriminatory terms any devices manufactured by them for use in furnishing central station service. This provision similarly is necessary if competitors are to have fair access to the market that ADT now controls.

4. The government was entitled to visitation rights—a proposal to which the defendants agreed in the district court. *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 95.

B. In two respects, the relief granted by the district court seems inappropriate. We see no basis in the record for the prohibition against any of the defendants employing Mr. Fleming. In addition, on the remand of this case we think it would be appropriate for the district court to replace or implement the general prohibition against violating the antitrust laws with more specific enumeration of the precise practices that are prohibited.

III

The district judge was not personally biased and prejudiced and did not deny defendants a fair trial.

The claim of bias and prejudice rests largely on certain statements made by Judge Wyzanski during pre-trial proceedings following the filing of briefs by both sides setting forth their views on the merits and the relief that would be appropriate if the government prevailed. The judge adopted this procedure at the request of the defendants, and he had warned them that they were "running some risk" because his views on relief would have to assume that the government could prove what it alleged. Properly read in context, the judge's statements show no more than his conclusion that, if the facts were as the government had alleged, stringent relief would be required.

Such statements did not show that Judge Wyzanski was personally biased and prejudiced. They reflected only his preliminary view, formed on the basis of the evidence detailed in the government's brief, that the government had a strong case. To be disqualifying under the statute (28 U.S.C. 144), the alleged bias and prejudice must be against the defendant personally, *i.e.*, it must stem from some extrajudicial source and must lead the judge to form an opinion as to the merits of a particular legal controversy on some basis other than what he has learned through his participation in the case. *Berger* v. *United States*, 255 U.S. 22.

Nor can any inference of personal bias and prejudice be drawn from the court's action in setting the

case for trial in 18 days. This action reflected its view that there should be no further delay in the trial of a case in which the complaint had been filed more than three years earlier and in which the state of pretrial preparation indicated that the parties should be able to go to trial promptly.

Nor did any of the statements made by Judge Wyzanski during the trial reflect any prejudgment of the case. The defendants rely upon statements taken out of context; when viewed in proper perspective they reflect only the district court's opinions as to the kind of evidence that is relevant in cases of this type. The judge stated both during and after the trial that he had not made up his mind as to the outcome.

B. The defendants were not denied a fair trial because they were required to go to trial on 18 days' notice. As we have noted, in the circumstances of this case setting the trial time on that short notice was not unreasonable. In any event, the defendants have not shown that they were prejudiced by this ruling. They point to no evidence that they were prevented from presenting because of lack of time to complete its preparation. On the contrary, they presented an exhaustive case, calling 31 witnesses and introducing 773 exhibits and excerpts from 47 depositions.

Nor were the defendants denied a fair trial because the court admitted in bulk all of the government's evidence, which was wholly written, and refused at that time to rule on the numerous objections the defendants filed to particular items.

ARGUMENT

I. THE DEFENDANTS MONOPOLIZED THE BUSINESS OF SUPPLYING ACCREDITED CENTRAL STATION SERVICE, IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT.

A. THE DISTRICT COURT CORRECTLY FOUND THAT THE RELEVANT PRODUCT MARKET IS ACCREDITED CENTRAL STATION SERVICE, AND THE RELEVANT GEOGRAPHIC MARKET IS NATIONWIDE.

1. The purpose and method of market definition in monopolization cases

Section 2 of the Sherman Act makes it an offense for any person to "monopolize * * * any part of the trade or commerce among the several States * * *." The offense of monopolization comprises 2 elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power, *i.e.*, that such power was not "thrust upon" its possessor (*United States* v. *Aluminum Company of America,* 148 F. 2d 416, 429 (C.A. 2), hereinafter cited as "*Alcoa*"), or was not "solely or even largely attributable to the superior quality of [the product] or to the technique or business acumen of" the producer (*United States* v. *duPont & Company,* 351 U.S. 377, 385, hereinafter cited as "*Cellophane*").

Monopoly power—the first of the two elements of the monopolization offense—is "the power to control prices or exclude competition" (*Cellophane,* p. 391). The existence of such power ordinarily may be inferred from the possession of a predominant share of the market. Sustained occupancy of a predominant position in a significant and separable market is strong evidence of power to control prices or to exclude competition. Hence, in *Alcoa* (p. 429) Judge

Learned Hand, in a passage which this Court subsequently specifically endorsed (*American Tobacco Co.* v. *United States,* 328 U.S. 781, 813–814), held that possession of 90 percent of the market constituted monopoly power. Similarly, in *Cellophane* this Court "assumed" that possession of 75 percent of the market constituted such power (351 U.S. at 379, 391).[15] Cf. *American Tobacco, supra,* where the three defendants whom the jury had convicted of conspiracy and combination to monopolize had "over two-thirds of the entire domestic field of cigarettes, and * * * over 80% of the field of comparable cigarettes"—a share the Court characterized as "a substantial monopoly" (328 U.S. at 797).

In the present case, the defendants' 87 percent of the accredited central station business is sufficiently close to Alcoa's market share as to leave no doubt that, if accredited central station service is appropriately considered as a market, the defendants have monopoly power there. (Indeed, under *Cellophane* ADT's 73 percent of the accredited central station service market would appear sufficient to establish that ADT itself has monopoly power.) The critical question, therefore, is that of the definition of the relevant market.

Such definition is important in monopolization cases because, unless the percentage share is related to "the

[15] See, also, the dissenting opinion of the Chief Justice in *Cellophane* which, after concluding that the relevant market was cellophane rather than flexible packaging materials (as the majority held), stated (351 U.S. at 425): "Since duPont has the lion's share of that market, it must have monopoly power, as the majority concede."

competitive market for the product" (*Cellophane* at 393), it is apt to give a wholly misleading impression of the seller's power. Assume, for example, that a firm has 95 percent of the market for Product *A*. On the surface, it would seem that it has the power to control the price of that product. But if there are a number of substitute products which are so closely acceptable to consumers of Product *A* that even a slight increase in the price of that product will lead all of them to shift their patronage to the substitutes, the producer of Product *A*, despite his overwhelming share of the market for that product, does not in fact have the power to control its price. For in such circumstances the producer, in setting his price, necessarily must give controlling weight to the prices of the substitutes. Thus, the relevant market for determining whether such a producer has monopoly power over Product *A*—*i.e.*, the power to control prices and exclude competitors—is not just the product itself, where he has 95 percent of the market, but a broader market including the substitute products to which his customers will turn if there is a slight increase in price. This, of course, is the teaching of the *Cellophane* case.

In *Cellophane* this Court held that the relevant market for determining the existence of monopoly power is "composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." 351 U.S. at 404. See, also, *id.* at 395 ("commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or com-

merce,' the monopolization of which may be illegal"). In *International Boxing Club* v. *United States*, 358 U.S. 242, 249–252, the Court applied the *Cellophane* market test in upholding the district court's finding that the business of promoting championship boxing contests (as distinguished from all professional boxing events) constituted the relevant market for determining the existence of monopoly power. As we develop below, in the present case, the district court correctly applied that test in finding that the accredited central station business constitutes the relevant market for determining whether the defendants have monopoly power over that business.

The critical issue in defining the market in this case—as indeed in all monopolization cases—is how broad a range of substitutes must be included. Of course, "substitutes are available for almost all commodities, and to raise the price enough is to evoke them" (*Alcoa*, 148 F. 2d at 426); the question is how closely substitutable the competing products must be before they must be included in the market.

We believe that the *Cellophane* standard of "reasonable consumer product interchangeability," properly applied, is a strict one. That is, a substitute product is to be included in the relevant market only where the distinctions between the products are sufficiently minor from the consumer's point of view that he is relatively indifferent as to which product he uses. Stated somewhat differently, it is only where there is a low degree of product differentiation, and a high degree of shifting from one product to the substitute in response to price changes (or, as the econo-

mists call it, high cross-elasticity of demand), that market shares of the product which is the subject of the alleged monopolization may not be assumed to reflect the producer's power to fix prices or eliminate competition.

This understanding of the content of the *Cellophane* standard is required by the very purpose of the prohibition against monopolization. Section 2 reflects a congressional policy to protect the economy against concentrations of economic power that eliminate or disrupt the play of normal competitive forces in the market. If the relevant market is broadly drawn to include a wide range of substitutes, that policy will be thwarted. For one who controls the predominant share of a well differentiated product can, to a significant degree, ignore substitutes in fixing his prices; to that extent his economic power operates to insulate the product from normal competitive forces. The greater the differentiation between products, the greater the leeway possessed by a producer to ignore substitutes in setting his own prices. Granted that even in case of products with substantial variations and differences there comes a point at which the impact of substitutes must be considered in fixing prices; but that does not negate the existence of monopoly power. Thus, the fact that the alarm company defendants "do not have unfettered power to control the price of their services" (Fdg. 46, R. 756) does not undermine the court's conclusion that accredited central station service is a separate market that is capable of being monopolized.

2. Accredited central station service is a relevant product market.

The district court found (Fdg., 36, R. 754) that "for purposes of the antitrust laws there exists a specific, separate, identifiable, recognized market limited to accredited central service protective systems operated by largely automatic devices." The defendants contend that this market is both too broad and too narrow—too broad in that it improperly combines the various types of central station services, such as fire alarm and burglar alarm; and too narrow in that it improperly excludes other types of protective service, such as unaccredited central service, local alarm service, etc. We submit, however, that the record shows that accredited central station service "is a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes" (*International Boxing Club* v. *United States*, 358 U.S. 242, 252).

a. *The district court properly treated the entire central service business as a single market.* Although the district court did not make any subsidiary findings as to the factors that justify treating all central service as a single market, the record fully supports its ultimate implicit finding that the entire central service industry is a single business (Fdgs. 2, R. 747; Fdg. 43, R. 755). To be sure, the various types of central station service provide against different hazards, and someone who is interested only in fire protection has no need for burglary alarm service. But, except for Holmes and AFA (who, as a result of restrictive agreements, for more than 50 years have

limited themselves to burglary and fire alarm service, respectively, see the Statement, *supra,* pp. 13–18), firms in the central station business generally provide all forms of protection (GX 312, R. 2274). Thus, an officer of a non-defendant firm stated that they had "a fairly typical central office" (GX 336, R. 2856); it furnished "central station burglar alarms, central station holdup alarms, waterflow alarms, sprinkler supervisory service, watchman supervisory service, and I would probably group everything else under the industrial process supervision, boiler supervision, building temperature supervision * * * That is all central office service" (*id.*, pp. 2855–2856; see, also GX 330, R. 2708; GX 337, R. 2880). Central station companies recognize that to compete effectively they must offer all types of service (GX 351, pp. 33–34). The different forms of central station service concededly are provided from a single office, and customers frequently utilize the different services in combination (GX 98, R. 1519; GX 325, R. 2520; GX 347, R. 3006; GX 320, R. 2458, 2460). Indeed, ADT has advertised that "thousands of firms, large and small, now protect their properties with appropriate combinations of ADT Automatic Protection Services" (GX 291, R. 2188). Essentially, the product here is hazard protection through the means of a central warning station.

In *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 356, this Court held that "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) de-

noted by the term 'commercial banking' * * * composes a distinct line of commerce." See, also, *United States* v. *First National Bank and Trust Co. of Lexington,* 376 U.S. 665, 667–668, reaching the same conclusion in holding that a bank merger violated Section 1 of the Sherman Act. The granting of credit and the administration of trusts are no less disparate than the provision of protection service against the hazards of fire and burglary. In both instances, combining the different services into a single market accords with the commercial realities of the industry, and therefore provides an appropriate frame of reference for determining competitive impact.

ADT contends (Br. 44–57), however, that since the various kinds of central station services are not "reasonably interchangeable," *Cellophane* bars combining them into a single market. The *Cellophane* test of "reasonable interchangeability" governs the determination of how broadly a market must be drawn, *i.e.,* to what extent substitutes must be considered in determining the existence of monopoly power over a particular product. See *supra,* pp. 42–45. It does not deal with the question whether different products may properly be combined in a single market which reflects the commercial conditions under which they are sold. Since the central station industry itself treats the various forms of protection that it provides as integral parts of a single business, it is proper to define the market to include all those parts in order to ascertain whether someone has monopoly power over that business.

b. *The district court correctly found that accredited central station service is a separate market.* The district court's finding that accredited central station service is a separate market (Fdg. 36, R. 754) rests upon the following subsidiary findings, among others: Non-automatic systems differ from automatic arrangements such as those in the accredited central station service "not merely in technology but in utility, efficiency, reliability, responsiveness, and continuity (Fdg. 29, R. 753); insurance companies allow a "far larger" reduction in premiums for accredited central station service than for other types of protection (Fdg. 33, R. 754); the "preponderant shift" by customers who change their kind of protective service "is from the less integrated, advanced, expensive, and safe method of proprietary systems to accredited CSPS, thus indicating a customer recognition of a difference in market" (Fdg. 13, R. 749); there are trade associations "uniting under one roof accredited central station protective service companies, and not including the generality of all types of automatic alarm systems" (Fdg. 34, R. 754).[16] As we now show, these findings are not clearly erroneous—on the contrary, they are supported by the record; and they show that accredited central station service and other forms of protective service do not have that "reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered" (*Cello-*

[16] The record shows that there is only one trade association—the Central Station Electric Protection Association—which limits its membership to firms engaged in the accredited central station business (GX 355, pp. 35–36).

phane, 351 U.S. at 404), that is required before they must be combined in a single market. Cf. *International Boxing Club. v. United States,* 358 U.S. 242, 249–252.

The business here involved is a service industry—it provides its customers with protection against hazards—and it is in the light of that function that the degree of interchangeability between accredited central station and other forms of services must be determined. We have described in the Statement, *supra,* pp. 5–9, a number of features which make accredited central station service superior to all others, and we shall discuss some of them in greater detail. Two of these exclusive features are particularly important in view of the purpose of protective systems, which is to give a warning when a hazard occurs. One is that only a central station system automatically warns not only when a hazard occurs, but also when there is any defect in the hazard-detecting equipment that renders it ineffective. The other is that only a central station guarantees that there always will be trained personnel on hand who immediately will take whatever action is necessary to cope with the particular emergency. Taken together, these two significant advantages go a long way to explain both the strong consumer preference for accredited central station service, and the recognition by the insurance industry of its superior qualities.

Indeed, ADT has recognized the superiority of this service. In its 1953 annual report it told its stockholders that 90 percent of its revenue was derived from central station service, which is "[r]ated by all

authorities as the highest type of electric protection service * * *" (GX 276, R. 2131).

(1) Accredited versus non-accredited service.

Insurance underwriters have established detailed standards governing both central stations themselves and the quality, installation and operation of the equipment used in providing the service; they also have established laboratories which test the latter (GX 1, R. 789–812; GX 3, R. 843–876; GX 6, R. 1089–1094). Thus, a subscriber to accredited central station service is assured that the station is, among other things: located in a building of approved design (GX 3, R. 849–850); provided with an independent emergency lighting system (GX 3, R. 850) and two alternate main power sources (GX 1, R. 800); constantly manned by a sufficient number of personnel (a minimum of two operators and at least two bonded guards or runners (GX 1, R. 795, GX 3, R. 855); provided with a direct, supervised line to fire headquarters, and, in addition, a direct telephone circuit to fire headquarters (GX 1, R. 794); provided with a direct tie-line connection to a police station where possible (GX 3, R. 849); and equipped with devices, circuits and equipment meeting the requirements of the underwriting organizations (GX 1, R. 794, GX 3, R. 849–854, and see GX 352, p. 13, GX 348, p. 22).

Adherence to underwriting standards is so important that it is not uncommon for insurance carriers to require accredited central station service as a condition to writing the insurance (See GX 320, R. 2473–2474; GX 340, R. 2932–2933; GX 318, R. 2407–2408; GX 336, R. 2877–2878; GX 339, R. 2919; GX 343,

R. 2972–2973; GX 357, R. 3149). The sales manager of Holmes, while noting that burglary insurance premium discounts for accredited central station protection service "will range from 40 percent to 70 percent," recognized that many subscribers do not take the necessary steps to qualify for the discounts.[17] Such a subscriber, he explained, has "two primary reasons" for nonetheless taking accredited central station serivce: "First, he finds it very difficult to obtain proper insurance coverage without it, and secondly, he would be running the risk of serious interruption to his business should he sustain a substantial loss even though covered by insurance" (GX 289, R. 2187).

Non-accredited central station service is of minor significance in the business; virtually the only central station companies in that status are those that have not yet been able to meet the standards of the rating bureaus (W 37a, R. 5487–5488;). (D. Ex. W 40a, R. 5574; W 45a, R. 5660, 5678–5679; W 40a, R. 5393; W 31a, R. 5405–5406; GX 324, R. 2500). In effect, therefore, the accredited central station services are those that have achieved the superiorities distinguishing this form of protection from others.

The commercial realities reflect this distinction. Operators of central stations testified that, as long as they were unapproved, they were unable to bid for many prospective accounts (GX 318, R. 2407–2408; GX 320, R. 2437; GX 329, R. 2659; GX 336, R. 2877-

[17] Approximately 60 percent of the subscribers to accredited central station burglary service do not receive the discounts (GX 310, R. 2263; GX 312, R. 2274–2278). Virtually all fire alarm subscribers do, however. See text, *infra*, p. 55.

2878; GX 340, R. 2932–2933; GX 341, R. 2940; GX 343, R. 2967–2968; GX 351, R. 3047; GX 362, R. 3224; W 37a, R. 5489; and see GX 320, R. 2473–2474; GX 326, R. 2562; GX 339, R. 2919; GX 343, R. 2972–2973; GX 349, R. 3034; GX 351, R. 3036; GX 357, R. 3149), could not win contracts even where their bids were lower than an accredited company's bid (GX 340, R. 2932–2933), and were refused contracts because customers considered unaccredited service to be "an inferior product and they don't want to start dealing with you" (W 37a, R. 5487). (There is no suggestion in the record of arbitrary or discriminatory application of the accreditation standards.) As an official of one central station company described his experience before he obtained accreditation:

> There were many accounts that we could not—that we could not approach because we could not give them the service they required. There were a number of accounts that we approached only to find out that we could not give them the service that they required because we could not give them the insurance credits involved nor, of course, could we offer them the fire protection services that would comply with F.I.A. requirements or similar rating organization requirements. Therefore a lot of business was closed to us prior to that fact that we went into the approved central station business. [GX 336, R. 2877–2878; see GX 324, R. 2512–2513; GX 338, R. 2891] [18]

[18] ADT's employees also recognized the importance of accreditation. Referring to the San Fernando Valley area, ADT's district officials there reported: "At present we do not issue Central Station Certificates; this has been a serious handicap to our sales efforts, and we have definitely lost accounts for this reason" (GX 160, R. 1591).

Because of the difficulties they faced, most non-accredited companies became accredited or intended to do so as soon as they could meet the underwriters' standards (GX320, R. 2436; GX320, R. 2437; GX326, R. 2562; GX 336, R. 2877–2878; GX338, R. 2891; GX-341, R. 2940; GX 342, R. 2949; GX343, R. 2967–2968; GX349, R. 3034; GX351, R. 3047–3048; GX362, R. 3224; GX362, R. 3227–3228; W6a, R. 4750–4751; W45a, R. 5678–5679; GX324, R. 2513). As some of them explained: "you can't sell services today to first rate accounts without it" (GX326, R. 2562); "[y]ou don't really have central station for fire alarm work unless you have approval" (GX342, R. 2949); there would be "no point" to going into the fire alarm business "because we couldn't issue a certificate" (W45a, R. 5679). Indeed, the defendants have in effect conceded that unaccredited central service is an insignificant part of the business. In a brief filed in the district court, they stated (R. 246) that "practically all non-defendant central station companies in the United States" are members of the Central Station Electrical Protection Association. That trade association, however, limits its membership to accredited firms (GX339, p. 68; GX355, p. 35–36; GX356, p. 24–25).

(2) Accredited central service station versus other forms of protective service

The insurance industry has recognized the greater degree of protection, and hence the superior service, that accredited central stations provide. Insurance companies allow various discounts in premium rates

for different types of protection service. As the district court found (Fdg. 33, R. 754), however, the discount is "far larger" on accredited central station service than on other types of protection.

Indeed, some rating bureaus allow discounts upon fire insurance only for accredited central station service. The District of Columbia Rating Bureau, for example, grants fire insurance premium discounts only upon the installation of accredited central station service (GX 317, R. 2355–2356). It allows no discounts or credits for proprietary, auxiliary, direct connected, remote station or local fire alarm systems (GX 317, R. 2365–2366). The manager of the bureau explained that these other systems "through neglect or through ignorance of the property owner * * * might deteriorate or not be functioning at the time it was probably needed" (GX 317, R. 2366).[19]

Virtually all central station fire alarm systems installed by accredited companies have been inspected and approved by the insurance underwriters, thus qualifying the subscribers for substantial premium discounts (GX 325 R. 2524, GX 326, 2547, 2548, GX 329, 2655, GX 330, 2715, GX 331, 2770, GX 334,

[19] ADT asserts (Br. p. 85) that "local and direct connected (remote station) electric fire protection systems are given discount recognition by the Bureau's member insurance companies." The witness testified, however, that while some member companies have filed with the District of Columbia Insurance Commission insurance policies which "mention" local and direct connected alarm systems, no discounts are granted for these systems (GX 317, R. 2388). Thus, the controlling "local regulations" of the District of Columbia Rating Bureau allow fire insurance premium discounts only for accredited central station protection service.

2847, GX 342, 2949–2950, GX 347, 3009, GX 362, 3208). The record shows that the inability of unaccredited fire alarm systems to qualify for insurance discounts makes customers unwilling to accept them.[20]

The National Board of Casualty Underwriters, the rate-making body for 80 percent of the companies writing burglary insurance throughout the United States (GX 346, pp. 34–35), allows insurance premium discounts of up to 70 percent for accredited central station protection service, while the maximum allowable discount for local burglar alarm service is fixed at 35 percent.[21] Users of other types of electric

[20] Referring to his experience with non-accredited fire alarm systems, the owner of a protection service company testified: "* * * in order to put in a fire alarm service, people expect to get a reduction in their [insurance] rates * * * we couldn't sell any * * * because they couldn't get a reduction, they didn't want it" (GX 362, R. 3224). Asked why his company had no fire alarm subscribers, the owner of a local alarm company stated: "Fire alarm has to go to a central station and a central station has to meet specific requirements * * *" (W 7a, R. 4787). Except for government installations, all ADT central station fire protection systems have been inspected and approved by some insurance organization (GX 313, R. 2294).

[21] GX 5, R. 1018. The National Bureau of Casualty Underwriters has 89 member companies, and 242 subscriber companies (GX 346, p. 34). While ADT erroneously asserts (Br., pp. 77–78) that "less than one-half" of the subscriber companies apply NBCU rates, the manager of the Burglary Committee of the NBCU testified that:

> * * * a subscriber, if he subscribes to the National Bureau for a form of insurance, such as burglary, he has to comply with our rules, our rates, and policy forms identical to the way any member company would have to, so they have no more leeway. Q. Does that mean that every mem-

burglar protection services—which include direct connected service (*i.e.*, alarms connected directly to a police station or to a telephone answering service)—receive no insurance discounts at all (GX 346, R. 2984–2987).

The record amply supports the district court's finding (Fdg. 13, R. 749) that when customers change from one form of protective service to another, the "preponderant shift" is from other kinds of service to accredited central station service. The following table summarizes the testimony of representatives of non-defendant accredited central station service as to shifts in business between non-central station protection [22] and accredited central station service. The first column shows shifts from non-central station service to accredited central stations; the second column shows shifts in the other direction. Under each column, the first figure is the number of customers who shifted; the second figure (in parenthesis) is the period of time during which shifts were noted. Where no figures are given for particular items for a particular company, it means that the witness did not supply them.

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ber and every subscriber to the National Bureau is obliged to grant the discounts which are set forth in your manual? A. That is right. [GX 346, p. 43.]

[22] As used in the table, non-central service consists of local, proprietary, auxiliary, remote station and watchmen service. See *infra*, pp. 58–62, for a description and discussion of these services.

Shifts between different forms of protection service

Company	Non-central service to accredited CSPS	Accredited CSPS to non-central station service	
Federal Engineering	20 (5 yrs.)	0 (5 yrs.)	GX 320, R. 2467
Protection Engineering	10-15 (5 yrs.)	0 (5 yrs.)	GX 325, R. 2537-2538
Potter Electric	more by far	4-5 (5 yrs.)	GX 326, R. 2558-2559
Central Office Alarm	242 (3 yrs.)	0 (3 yrs.)	GX 329, R. 2657-2660
Morse (Cleveland)	20 (1 yr.)	Less than 10 (1 yr.)	GX 347, R. 2970-2971
Owl Protective Co.	(5 yrs.)	10-15 (5 yrs)	GX 330, R. 2718-2719
Denver Burgler Alarm	25 (1 yr.)	12 (5 yrs.)	GX 333, R. 2835
Sentinel Alarm Corp.	20-25 (2 yrs.)	0 (2 yrs.)	GX 334, R. 2849-2850
Automatic Alarm Corp.	20 (1 yr.)		GX 336, R. 2857
American Fire Dispatch	100-250	12	GX 337, pp. 93-94
Fidelity Electronics	0	0	GX 338, pp. 15-16
Central Station Signals	"right along"	0	GX 339, R. 2902-2906
Protection Alarms, Inc.		0	GX 342, R. 2953-2953
Albany protective	50 (10 yrs.)	0	GX 341, R. 2938-2939
Potter Electric (Ohio)	5 or 6 (5 yrs.)	2 (5 yrs.)	GX 345, pp. 63-65
Kedzie-Kane		½ of 1%	GX 347, R. 3015
Michigan Still Alarm	100-200 (10 yrs.)	2 (10 yrs.)	GX 351, R. 3045-3047
Smith Det. & NW	28 (1 yr.)	1-2 (1 hr.)	GX 355, R. 3086-3088
McKane-Sondock	20-25 (5 yrs.)	5-10 (4-5 yrs.)	GX 356, pp. 25-26
Central Watch	150 (15 yrs.)	4-5 (15 yrs.)	GX 357, R. 3121
Morse Signal (L.A.)	25% of existing subscribers	6 (5 yrs.)	GX 362, R. 3225-3 26

We shall now show that, having due regard for price, use and quality, none of the other forms of protective service has "reasonable interchangeability" (*Cellophane, supra*) with accredited central station service.

(a) *Watchmen.*—Watchman service, because of high wage levels and fringe benefits, is far more costly than accredited central station protection (GX 291, R. 2187–2188; GX 318, R. 2398; GX 355, R. 3088-3091; G 356, R. 3105–3107; GX 333, R. 2838.[23] One

[23] A study conducted by the Associated Factory Mutual Insurance Companies reveals that the cost of maintaining one watchman on the premises during the "closed periods" exceeds $17,500 annually (GX 348 pp. 33–34). Moreover, even where full-time watchmen are employed, accredited central station watchman supervision may be required (GX 346, R. 2991). The Associated Factory Mutual Insurance Companies, for example, recognize that watchman supervision by an "approved

firm replaced a single watchman who had cost more than $10,000 annually with accredited central station service at a cost of about $1,650 a year (GX 357, R. 3119; and see GX 357, R. 3118). A watchman is not as reliable as accredited central station service because he may be asleep or drunk and unable to take necessary action when a fire or burglary occurs (GX 7, R. 1182–1184). The use of watchmen alone often does not provide as great a discount as accredited central station protection. For example, there may be a discount on burglary insurance if full-time watchmen are provided (GX 346, pp. 29–30) *and* if they are supervised by an accredited central station or by a police station connection (GX 346, R. 2991).[24]

(b) *Local Alarms.*—Electrically operated systems which set off an audible alarm at the site of a fire or burglary are significantly less expensive than accredited central station protection (GX 331, R. 2783),

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central station" provides (a) security for the watchman in event of accident, sudden illness, burglary and holdup; (b) emergency watch service in the event the watchman is incapacitated; (c) prompt discovery of watchman's delinquencies; and (d) a convenient method of summoning the public fire department in event of fire. These extra services are especially valuable where the watchman is the only person on the premises during non-operating periods (GX 348, p. 38).

[24] The maximum burglary insurance premium discount available for full-time, supervised watchmen is not, as ADT asserts (Br. p. 81) "90 percent against a maximum and seldom used, 70 percent for central station services." When one watchman (electrically supervised) is placed in the insured's exclusive employment, the premium discount is reduced by 30 percent (GX 346, R. 2991). For each additional watchman (to a maximum of three) the premium is reduced an additional 30 percent of the remaining balance, not the full premium (GX 346, R. 2991). Thus, the maximum discount available for watchman service is about 66 percent.

but they do not provide the same services as the latter. The major difference is that there is no assurance that anyone will respond to the alarm and notify the police or fire department (GX 320, R. 2469–2470; GX 355, p. 60). Moreover, although an accredited central station will give warning if the signaling devices are not functioning properly, a local alarm system may be inoperable without anyone knowing it (GX 320, R. 2469, 2470; GX 331, R. 2781–2784; GX 333, R. 2837, 2839). It is presumably because of these deficiencies that, as noted, local burglar alarms do not qualify for insurance discounts comparable to those accorded accredited central station service.[25]

Indeed, even the defendants do not consider local systems to be really competitive with accredited central station service. In a letter to Grinnell's general counsel, ADT's vice president concluded that "local

[25] The defendants argue that the discount for bank protection is the same for accredited central station protection and for local alarm service (ADT Br. p. 77). While the discount schedules used by the National Bureau do not distinguished between the two types of service as applied to banks, the point is unimportant. The member and subscriber companies of the National Bureau derived earned premiums of less than $130,000 from all banks during the year 1961 (GX 346, p. 33). On the other hand, earned premiums on mercantile open stock during 1961 exceeded $16.5 million (GX 346, p. 36). Because of the almost insignificant volume of bank burglary insurance involved, the Bureau has not even coded bank insurance premiums. "Coding" refers to a compilation of premiums earned, and policy payments made. If losses are large, premiums will be adjusted. Nor is the premium volume large enough to permit a statistically valid result (GX 346, p. 37). The manager of the Burglary and Glass Division of the National Bureau of Casualty Underwriters testified: "I am sure that we do not have enough premium volume [in bank burglary insurance] to be of any concern to anyone" (GX 346, p. 39).

burglar alarm business and central station burglar alarm business fall into entirely different categories. For all practical purposes it is not considered that these companies offer any serious form of competition" (GX 277, R. 2135; and see GX 280, R. 2157; GX 281, R. 2158). See, also, GX 218, R. 2028. Competition between these services was so limited that ADT salesmen referred to local alarm companies customers whom they did not consider as good prospects for central station service (GX 281, R. 2158; GX 318, R. 2407–2409; W. 46a, R. 5716). Holmes "did not consider any other alarm system as competition because we felt that we were superior to any of them and that would be particularly true with respect to Locals" (GX 283, R. 2163). The president of AFA testified at the trial that "we are in the central office business, and we do not pay much attention to anyone outside of the central office business" (R. 639).

(c) *Proprietary Systems.*—This in effect is a central station system that a customer purchases and operates himself at a single large installation (GX 2, R. 834; GX 320, R. 2478). The installation charges are high, and the system is expensive to operate, because it requires full-time trained personnel (R. 366; GX 331, R. 2746). Accordingly, it can be used only by very large businesses or the government, and is not a realistic alternative for most mercantile or industrial concerns.[26]

[26] In 1953, in response to a questionnaire prepared by ADT, the commercial superintendents of its central stations in various sections of the country replied that the potential in their districts for proprietary systems was "quite limited," "little if any," "little or none," "comparatively small," "none," or "neg-

(d) *Direct Connected or Auxiliary Service.*—This is a system in which protective devices are connected directly to a municipal police or fire department. Most cities that have an accredited central station company do not permit direct connected service, and most of those that do limit such connections to governmental or charitable establishments (GX 318, R. 2396; GX 320, R. 2434; GX 326, R. 2548–2549; GX 329, R. 2656; GX 330, R. 2716–2717; GX 331, R. 2766; GX 333, R. 2839; GX 338, R. 2891–2892; GX 347, R. 3007; GX 351, R. 3043; GX 355, R. 3084; GX 356, R. 3108–3109; GX 362, R. 3223; GX 336, pp. 56–58, GX 341, pp. 5–6, GX 342, p. 27–28, GX 343, p. 57). When insurance companies grant discounts on this service they are not as large as on central station service (W 41a, R. 5624); indeed, they allow no discount for direct connected burglar alarms.[27]

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ligible" (GX 285, R. 2171; 2172). All but two stated that proprietary systems provided no threat to their central station business, and those two believed that proprietary systems provided "little, if any" threat (GX 285, R. 2172).

[27] Asked why the National Bureau of Casualty Underwriters granted no discounts for direct connected systems, while at the same time granting up to 70 percent reductions for accredited central station protection service, the manager of the Bureau testified that "it has been found * * * the police ignore the thing entirely. Many police stations do not want it [direct connect alarms]. There are many factors involved" (GX 346, R. 2986). Asked whether or not the Bureau had even considered granting discounts to users of telephone answering service alarms, he answered: "* * * that situation [telephone answering alarms] is even more ridiculous than the police station, so it never gets to the point of serious discussion." (GX 346, R. 2986). The Bureau does not grant discounts for patrol service (GX 346, R. 2987).

The 25 per cent discount which the defendants attribute to the installation of direct connected or telephone answering sys-

In sum, judged by the standard of *Cellophane,* the district court properly concluded that the relevant product market is accredited central station service.

3. The geographic market for accredited central station service is national.

The district court found that, "regardless of such local or city markets" that might constitute separate markets under the antitrust laws, "there exists a national interstate commerce market in accredited Central Station Protective Services" (Fdg. 38, R. 754). This finding was based upon subsidiary findings that "because of the very nature of these automatic devices [used to provide central station service] and the services related thereto, and the patterns in which that industry has developed the market has a national interstate-commerce character" (Fdg., 37, R. 754); that the existence of a national market is "underlined by defendants' own national pattern of business * * * and with its constant use of interstate commerce involving equipment, officers, salesmen, correspondence, even to an appreciable extent electric current carrying alarm signals from one state to an-

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tems (ADT Brief p. 78) is unrelated to alarms systems of any type. The 25 percent credit, in the words of the manager of the Bureau's Burglar Division, is a "good housekeeping," "personnel," and "physical characteristics" discount (GX 346, p. 44). When asked whether this "good housekeeping" discount had ever been granted for the installation of a proprietary, direct connected, or telephone answering alarm, the Bureau's manager stated that he has no knowledge of any such instance (GX 346, p. 45), and stated further: "I am not aware that they * * * tag the good housekeeping discount as being given in recognition of alarm protection. I am not aware that they do it." (GX 346, pp. 77–78).

other"[28] (Fdg. 39, R. 755); and that "the system of accredited CSPS rests upon a far-flung structure (a) of national planning, (b) of lapsed agreements covering activities in many states,[29] (c) of inspection, certification, and reduction of rates by national insurers, (d) of defendants' national schedule of prices, rates, and terms, and (e) even, on occasion, of national special discount prices to a particular customer who operates multi-state enterprises" (Fdg. 40, R. 755). These subsidiary findings fully support the court's ultimate finding of a national market and, like its findings on the product market, are fully supported by the record.

Although the activities of an individual accredited central station are local in the sense that it serves only a narrow geographical area—ordinarily within a radius of 25 miles of the station itself (Fdg. 3, R. 747)—the business of providing such service is operated on a national level. ADT, which in 1961 had 73 percent of the business done by accredited central station companies, plans and conducts its activities on a nationwide basis. ADT sets uniform prices—the so-called minimum basic rates (see the Statement,

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[28] The record contains a stipulation on the volume of central station service business that involved the interstate transmission of electric signals, and the volume of equipment purchased by central station companies from suppliers located in other states (GX 309, R. 2260–2262).

[29] The restrictive agreements of 1906 and 1907 (see the Statement, *supra*, pp. 13–16), under which the alarm company defendants limited the areas they would serve, were nationwide in scope. Their impact upon competition has been to enable ADT to develop into a business operating throughout the country, while at the same time limiting Holmes and AFA to a few cities.

supra, p. 19)—for the country as a whole (GX 313, R. 2291). It seeks to attain "a level which will produce, in the good offices, excess earnings [from its service rates] sufficiently large to absorb the deficiencies in the remaining office"; "[u]nder our *system operation*, we look to the good offices to support the poor to the degree necessary to produce a satisfactory *system earnings ratio*" (GX 96, R. 1496, emphasis added). When ADT increased its rates, it did so for its entire system, and its motivating consideration was its belief that the system's overall rate of return was inadequate (GX 210, R. 2012; GX 168, R. 1605; GX 209, R. 2006). Deviations from these system rates were permitted only to meet individual competitive situations, and ADT, in its total operation, was able to obtain a high percentage of its minimum charges (GX 222, R. 2033–2038).

Among other respects in which ADT conducts its business on a national level are the following: (1) It deals with large firms operating a multi-state business through their main offices, and negotiates nationwide contracts with such businesses covering numerous installations (R. 417–418); in 1960 these national accounts produced almost $10 million in revenue, almost one sixth of ADT's total central station service income (GX 317, R. 2268; GX 313, p. 15). (2) It manufactures and distributes in interstate commerce to its various operating companies a substantial amount of the equipment which the latter used in providing service; in 1960 the value of the equipment thus manufactured and furnished was more than $3 million (GX 309, R. 2261). It also distributed to

those companies equipment that it purchased, valued at almost $6 million (GX 309, R. 2261). (3) It engages in national advertising (GX 7, R. 1181). (4) It conducts substantial research for the system as a whole (GX 7, R. 1181; R. 544–549).

The sum of it is, as the district court found, that the accredited central station business is an interstate business, planned and operated on a nationwide scale, and dependent upon the facilities of interstate commerce for its activities and economic health. In such circumstances, the relevant market for determining whether the defendants have monopoly power is not the local areas which the individual central stations serve, but the broader national market which reflects the economic realities of the way in which they conduct their business. Cf. *United States* v. *Griffith*, 334 U.S. 100; *International Boxing Club* v. *United States*, 348 U.S. 242.

B. THE DEFENDANTS MONOPOLIZED THE ACCREDITED CENTRAL STATION SERVICE BUSINESS

We have concluded our demonstration that the national accredited central station service business is an appropriate market in which to measure the existence of monopoly power. We turn now to the second element in the offense of monopolization—the willful acquisition or maintenance of that power.

The district court found (Fdg. 44, R. 756) that between 1957 and 1961 the alarm company defendants' "share of the total national CSPS market ranged from 87% to 91%"[29a] and that Holmes and ADT had

[29a] The revenues to which these percentages relate are derived only from accredited central stations, but do include income from burglary alarm service which has not been certificated for insurance discounts.

between 87 and 90 percent of all certified central station burglar alarm business.[20] The court held (R. 762) that this share of the market went "far beyond the line" that is "indicative of monopolistic control"; and that it "rests not on the skill, efficiency, and foresight of defendants, not even on their neutrally normal business methods, but on violations of *per se* rules governing restraints of trade and on acquisitions indicating that that growth was a response to external grasp, not to internal grip." These conclusions were correct, they are supported by the record, and they justify the court's holding (R. 761, 768; see, also, R. 742) that the defendants monopolized the accredited central station service business, in violation of Section 2 of the Sherman Act.

The record in this case amply demonstrates (1) that the device of combination was used to achieve and perpetuate monopoly power, and (2) that unlawful and exclusionary practices were used to achieve and perpetuate monopoly power.

1. The defendants' combination achieved and perpetuated monopoly power

a. *The background of the combination.* Since early in the century the alarm company defendants had been parties to restrictive agreements which preempted for each a segment of the market where it could expand free from the competition of the others. Under those agreements Holmes and AFA limited their operations to a relatively narrow geo-

[20] In 1961, the last year for which such data are in the record, the respective shares of these two categories were 87.85 and 85.49 percent (GX 213, R. 2268–2269).

graphical area, and ADT was free to expand throughout the rest of the country. The result was that by the time Grinnell acquired these companies between 1949 and 1953, ADT had acquired a predominant share of the business. See pp. 72–74, *infra*.

Although Grinnell was not engaged in the central station service business, it had a vital interest in the observance of one set of restrictive agreements. Under the 1907 fire alarm agreements, to which Grinnell was a party, it supplied certain important devices which the alarm company defendants used in providing fire alarm service; it also agreed not to engage in the central station business. In return, it received 25 percent of the revenues produced by the fire alarm protection systems for which it supplied the devices. See the Statement, *supra*, pp. 14–15. Those revenues were substantial; for the five-year period 1949 to 1953 (the earliest years for which the record contains such data), Grinnell received from ADT and AFA a total of almost $9 million (GX 316, R. 2344–2345). Thus, to the extent that the division of markets in the 1907 agreements enabled the alarm companies to increase their revenues because of the elimination of competition, Grinnell, as a result of its participation in such revenues, had a strong interest in insuring that the restrictions were observed.

As the 1954 termination date of the 1907 agreements approached, a dispute developed between Grinnell and ADT over the future business relationships between the companies. Grinnell apparently wished to continue to supply the devices in return for a share of the revenues, but ADT's counsel believed that the arrangement constituted an exclusive dealing arrange-

ment which violated the antitruth laws (GX 87, R. 1425–1430). During the discussions with ADT, Fleming, the president of Grinnell, stated that Grinnell was not "prepared to go completely out of the Supervisory business in 1954 even if no agreement were reached with the A.D.T. Company * * * and were prepared now to go into the central station business generally, including both Supervisory, Burglary, etc., service if this became necessary, although we would still much prefer to renew our arrangements with the A.D.T. on a fair basis" (GX 88, R. 1430, 1433).

b. *The combination to monopolize.*—Grinnell purchased controlling interests in AFA in 1949 and in Holmes in 1950. Fleming testified at the trial that one of the reasons Grinnell purchased AFA was because "[w]e were negotiating with ADT for an extension of the 1907 agreement. We knew that if we did not reach an agreement, Grinnell's participation would be cut down. We wanted to replace that income with other supervisory income if we could" (R. 674). He further testified (R. 676) that one of the reasons Grinnell bought Holmes was "so that we would know something about or have someone in the organization who knew something about the burglar alarm business so we could compete with ADT"; and that after the acquisitions Grinnell "considered whether we merge Holmes and Automatic [AFA], whether we would be in a better position to compete with ADT" (R. 688).

Grinnell and ADT settled their dispute in 1952: Grinnell agreed to accept a percentage of all revenues from systems that had been installed prior to the

termination date of the 1907 agreements (February 18, 1954), and abandoned any claim to a share of revenues from systems installed thereafter (GX 89, R. 1434–1470). Thus, when Grinnell acquired the controlling interest in ADT in 1953, the 1907 restrictive agreements were about to expire, and Grinnell could no longer look forward to the assured sources of income it had enjoyed through its participation in those agreements. Moreover, after those agreements had expired, each company would have been free to invade the markets of the others.

The record does not show the reasons for Grinnell's acquisition of ADT. But the effects of the acquisition upon competition are clear enough. Prior to the settlement of its dispute with ADT, Grinnell was "prepared now to go into the central station business generally * * * if this becomes necessary"; one reason for Grinnell's purchase of AFA was to replace Grinnell's share of the revenues it had been receiving from ADT "with other supervisory service" "if we did not reach an agreement with ADT"; and one reason for Grinnell's acquisition of Holmes was to "have someone in the organization who knew something about the burglar alarm business so we could compete with ADT." By acquiring ADT, Grinnell eliminated the possibility, which it had been considering, of itself entering the central station protection business and directly competing with the leader of the industry, ADT; and also the possibility that ADT might invade the territories of Holmes and AFA.[31]

[31] Contrary to Grinnell's contention (Br. pp. 111–112), the Department of Justice never "cleared" Grinnell's acquisition of ADT. Because the acquisition "raise[d] certain questions un-

When Grinnell over a four-year period acquired controlling stock interests in the three alarm company defendants it put together a combination that controlled between 87 and 90 percent of the market. It eliminated the potential outbreak of competition expected upon termination of the 1907 agreements. It perpetuated the restrictive conditions that had enabled those three alarm companies to gain an overwhelming share of the business. By the combination it perfected the monopoly power that can exclude competitors and fix prices. *Alcoa* teaches that the creation of such a combination constitutes monopolization and that it makes "no difference whether an existing competition is put an end to, or whether prospective competition is prevented" (148 F. 2d at 429). In a statement which this Court specifically endorsed in *American Tobacco Co.* v. *United States,* 328 U.S. 781,

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der [the antitrust] laws," the Department requested Grinnell to furnish certain information (DX J–52, R. 4205). When Grinnell submitted the information (DX J–56, R. 4209–4212), the Department thanked Grinnell and stated: "Your cooperation in furnishing the information requested is very much appreciated" (DX J–55, R. 4208). This statement by the Department obviously did not indicate any approval of the acquisition.

When the Department gives a "clearance," it does so in quite different terms. Thus, when the Department's view was requested in 1955 about a proposed acquisition by ADT of the General Alarm Company of Massachusetts, the Department advised the companies: "On the basis of the information you have submitted and the representations of the parties involved, the Department does not presently intend to take action with respect to the proposed acquisition" (DX U–1, R. 3686). Even this "clearance," however, was qualified as follows: "It is understood, however, that the Department reserves the right to take action in the future if other evidence or subsequent developments should warrant it" (*ibid.*).

813, 814, Judge Learned Hand stated (148 F. 2d at 429):

> * * * We may start therefore with the premise that to have combined ninety percent of the producers of ingot would have been to "monopolize" the ingot market; and, so far as concerns the public interest, it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented.

2. The alarm company defendants acquired and maintained market power by restrictive and exclusionary practices

In addition to the fact that monopoly power was perfected and perpetuated by means of a combination, the record in this case also amply demonstrates that the monopoly power possessed was not "thrust upon" the defendants (*Alcoa,* 148 F. 2d at 429), because restrictive and exclusionary practices were used both to derive and to maintain the power.

We have set forth in the Statement the various restrictive and exclusionary practices by which the defendants acquired and maintained their share of the market (*supra,* pp. 11–28). We shall discuss them only briefly here.

a. *Division of markets.* For almost 50 years—since the early days of the industry—the alarm company defendants operated under formal agreements dividing up the country into exclusive preserves. Holmes limited itself to providing burglar alarm and night-watch service in part of the Middle Atlantic States; AFA limited itself to the central station sprinkler supervisory and waterflow alarm service in New York

City, Boston and Philadelphia, and Automatic Fire Protection Co. (whose interest ADT acquired in 1949) obtained the right to provide such service in the rest of the country; ADT, although excluded from the three cities allocated to Holmes, had the right to provide fire and burglar alarm business in the other areas of the country not specifically preempted (*supra*, pp. 13–15). Such agreements for the division of territories and types of business have long been viewed as *per se* illegal under Section 1 of the Sherman Act. *United States* v. *Addyston Pipe and Steel Co.*, 85 Fed. 271 (C.A. 6), affirmed, 175 U.S. 211; *Hartford-Empire Co.* v. *United States*, 323 U.S. 386; *United States* v. *Timken Roller Bearing Co.*, 341 U.S. 593; *United States* v. *Nationwide Trailer Rental System*, 156 F. Supp. 800 (D. Kan.), affirmed, 355 U.S. 10.

Although the fire alarm agreements terminated in 1954 and the burglar alarm agreement was cancelled in 1947, the district court correctly pointed out (R. 761) that the "defendants, including Grinnell, continued most of the arrangements once founded on those unlawful legal instruments." As of December 31, 1961, "Holmes did not render service outside of the defined area [allotted to it under the burglar alarm agreement]; nor within the area did it serve a single central station fire alarm subscriber" (Fdg. 52, R. 758–759). Among the defendants "ADT continues as the exclusive source of central station nightwatch and burglar alarm service, AFA as the exclusive source of central station nightwatch and burglar alarm service, AFA as the exclusive source of central

station fire alarm service in New York, Philadelphia and Boston; and Grinnell does not furnish the types of service originally precluded by the 1907 agreements" (Fdg. 53, R. 759–760; see also *supra*, p. [illegible]).

Indeed, as recently as 1959 the president of AFA pointed out to Fleming, the president of Grinnell, the significant role the territorial limitations in the 1907 agreements played both in aiding the growth of ADT and in blocking the expansion of AFA. In explaining to Fleming why AFA rejected ADT's contention that the basis upon which the two companies continued to share revenues after the agreements had expired in 1954 was unfair to ADT, he stated (GX 94, R. 1484–1485):

> * * * the geographic restrictions placed upon us plus the requirement that we confine our activities to sprinkler and fire alarm services exclusively, since 1907 and presumably into the future, has definitely retarded our expansion in the past to the benefit of ADT growth.

Moreover, he treated the restrictions in those agreements as still operative, even though the agreements had terminated five years before. Not only did he state that the restrictions upon AFA's operations would continue "presumably into the future," but in the very next sentence he pointed out that "Automatic [AFA] is still denied the right of future expansion into existing and new fields born of normal business progress" (*id.*, p. 1485).

This unlawful restriction contributed significantly to the development of ADT's potent market position, which is now a major part of the combination's power. Perpetuation of the restriction after 1954 contributed to the maintenance of that power.

b. *Acquisitions.* Since 1907 ADT has acquired the stock or assets of 27 companies engaged in the business of providing fire or burglar alarm protection service, and Holmes has acquired three burglar alarm service companies (*supra*, p. 11). While some of these acquisitions—particularly in the earlier years—did not involve companies then engaged in the central station business, the acquisitions were, as the district court found (Fdg. 48, R. 757), "important sources of the market power achieved by the alarm company defendants."

Protection service companies frequently begin by providing less expensive and cheaper services, and then gradually moving into the superior central station service.[32] The acquisitions by ADT and Holmes thus gave the latter companies a base from which to build, and also blocked the development of potential competitors. Furthermore, in a number of instances the sellers executed long-term covenants not to engage in the protective service business (*supra*, p. 11), which further insulated ADT and Holmes from competition. On occasion, ADT immediately dismantled the facilities it had acquired (GX 13, R. 1196; GX 30-1, R. 1229; GX 313, R. 2292; see Fdg. 50, R. 757).

Even after Grinnell had acquired control of the alarm company defendants, they continued to attempt to acquire protective service companies, including four of the five largest non-defendant accredited central station firms (see *supra*, p. 12); and between 1954 and 1959 ADT acquired all or part of the business of three protection service companies (Fdg. 49,

[32] GX 318, R. 2393; GX 319, 2419; GX 320, R. 2433; GX 329, R. 2648; GX 333, R. 2789; GX 336, R. 2855; GX 351, R. 3036; GX 355, R. 3080; GX 356, R. 3103; GX 362, R. 3201.

50, R. 755). As the district court correctly found (Fdg. 50, R. 759), "the acquisitions indicate that ADT's growth, far from being attributable solely to superior techniques and methods of administration and like so-called honestly industrial means, owes more than a little to the special kind of appetite which has characteristically revealed a monopolistic temper and explained a monopolistic growth."

c. *Pricing practices.* The district court held (R. 761) that the alarm company defendants "resorted to restraints of trade prohibited by Section 1 of the Sherman Act when, faced with competition, they, being in a dominant position, manipulated their own prices to forestall competition."

ADT set system-wide prices at a level it anticipated would provide a satisfactory overall rate of return (GX 96, R. 1496). Where it met specific competitive situations, however, it often made drastic cuts in those prices—sometimes as much as 50 percent or more of the annual service charges, sometimes free installation of the equipment, sometimes even a combination of free installation and deep cuts in the service charges (see *supra*, pp. 19–20). In recommending acceptance of price cuts, salesmen repeatedly stressed the importance of keeping competitors out of the particular areas or businesses, excluding them from a large customer with other installations, or excluding them from the particular customer for a substantial period (see *supra*, pp. 20–22). As ADT's vice president stated, in explaining why ADT had reduced its charges on the renewal of its contract with RKO Pictures (GX 265, R. 2118):

> If the Morse people got R.K.O. studios, one of the majors, they would have their foot in the door, so to speak, and would have a weapon to use in soliciting other studios.

In Minneapolis, where a local burglar alarm company was attempting to enter the central station business, ADT's district sales manager advised the general sales manager that

> * * * unless we immediately proceed to meet him right at the starting point with a flexible price program * * * it is going to be impossible to successfully contain his operation. [GX 218, R. 2027]

ADT's philosophy in setting prices was clearly stated in 1956 by J. A. MacDonald, its first vice-president. In suggesting that a general rate increase, probably of around 6.7 percent, would shortly be necessary because of rising costs, he recognized that "service charges appear high, presently, as compared to those charged by competitors" (GX 167, R. 1603). He further stated (*id.*, pp. 1603–1604), however:

> Without presuming to minimize the necessity to continue to watch competitive prices, closely, I do not believe that we have yet reached a point where we should allow the competitive situation to completely govern the company's fiscal policy. The continued necessity for specific price concessions necessary to effectively cope with competition when it is encountered, is one of the eventualities against which our overall price structure must be geared.

In 1959, when ADT officials again discussed the need for a price increase, the general sales manager

"was most vehement in opposition to any price increase, claiming that we were in great danger of pricing ourselves out of the market" (GX 168, R. 1605). MacDonald responded by pointing out that "current sales averaged 95% of M. B. [minimum basic] annual service charges and about 80% M. B. advance service charges which expressed the extent of the overall competition encountered" (*id.*, p. 1606).

The record shows that ADT was able to obtain a significantly higher overall percentage of its basic charges in cities where it had no accredited central station competition than in cities where it had such competition. See *supra*, pp. 23–24, and the tables in the appendix, *infra*, pp. 119–124. This fact, when coupled with the company's method of fixing system-wide prices at a level intended to secure an overall adequate return and the numerous instances of deep cuts made to forestall specific competitors from getting their "foot in the door" with a particular customer, a particular location or a particular industry, indicates that ADT has been financing its price-cutting activities in competitive cities from its higher charges in monopoly areas. Cf. *United States* v. *Corn Products Refining Co.*, 234 Fed. 964, 1013–1014 (S.D.N.Y.); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 343 (D. Mass.), affirmed, 347 U.S. 521; *Report of The Attorney General's National Committee to Study the Antitrust Laws* (1955), 335.

Indeed, on occasion ADT representatives have warned competitors that ADT, as a large company, could and would use its profits from other markets to conduct a price war in a particular city. See the

Statement, *supra,* pp. 24–27. Cf. *Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115, 119–120.

d. *Contract terms.* The terms and conditions upon which ADT sold its services also operated to exclude competitors. Its standard service contract is for five years (GX 313, R. 2289),[33] thus insulating its customers from other sellers for a substantial period. It retains title to the equipment installed upon a subscriber's premises, even though the installation charge ordinarily covers the cost of labor and equipment and the overhead,[34] and also provides a profit[35] (Fdg. 6, R. 748; GX 229, R. 2056; GX 313, R. 2290–2291); and it removes salvageable equipment when the contract terminates (GX 313, R. 2295). Thus, customers are likely to be deterred from changing to another company when their contract expires, because they would incur substantial expenses for the installation of new equipment in place of that removed by ADT (GX 347, R. 3017–3018).

Moreover, the defendants treat a customer who moves to a new location more favorably if he continues to use the defendants' service than if he deals with a competitor. The defendants' contracts provide for the payment of a termination fee if the contract is cancelled before it expires (GX 256, R. 2103–2110;

[33] AFA also uses five-year contracts, and Holmes' contracts run from three to five years (GX 315, R. 2322–2323; GX 314, R. 2306–2307).

[34] Holmes and AFA also retain title to all protection service equipment installed on subscribers' premises (GX 298, R. 2199–2201; GX 307, R. 2229–2234).

[35] Holmes reported a profit of $190,000 from installation charges in 1960 (GX 236, R. 2075–2076).

GX 314, R. 2316–2317; GX 315, R. 2335–2336), but they waive this fee for a subscriber who moves to a new location and continues to use the defendants' service (GX 191, R. 1840; GX 191, R. 1846; GX 255, R. 2101–2102).

In sum, the policies and practices by which the alarm company defendants acquired and maintained their predominant share of the market

> represent something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production and distribution, which a competitive society must foster. They are contracts, arrangements and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potenial competition; they restrict a free market. * * *

United States v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 344–345 (D. Mass.), affirmed *per curiam*, 347 U.S. 521.

In the case of Grinnell, its acquisition of controlling interests in the three alarm company defendants was a "deliberate, calculated purchase of control" (*United States* v. *Reading Co.*, 253 U.S. 26, 57). Grinnell's monopoly position in the industry was not "thrust upon" it. On the contrary, as the district court found (Fdg. 20, R. 751), "Grinnell by its mere acquisition of control of companies which in combination have 87% of the accredited CSPS market has

shown by its actions that it is possessed by what the mediaevalists called 'the lust for power.'"

Grinnell cannot escape the consequences of the illegal antecedents of the monopoly power it acquired through the combination; even more clearly, Grinnell cannot escape responsibiilty for the restrictive and exclusionary practices in which the alarm company defendants engaged after Grinnell had acquired control of them on the claim that it did not interfere in their management. Grinnell has a high percentage of the stock of each of the companies—76 percent of ADT, 89 percent of AFA, and 100 percent of Holmes (R. 669; GX 316, R. 2338)—and it obviously has the power to impose its will upon them. Fleming, the president of Grinnell, is a member of the board of directors of each of the defendants, and chairman of the board of Grinnell; other "members of the Grinnell organizations" are members of "the boards of directors of these companies" (R. 691). Grinnell appoints four of the seven directors of ADT, who appoint the officers (R. 581). The district court described Fleming, after observing him on the stand, as a man of "competence, character, and force of leadership" (Fdg. 22, R. 751–752), who possesses "that kind of ability which * * * always carries with it command" (R. 693). There is only one director of ADT who is not an officer of either Grinnell or ADT (Fdg. 23, R. 752).

In the realities of the modern corporate world, a company is hardly likely to attempt to show any independence toward a parent that owns between 76 to 100 per cent of its stock. "Words of advice seemingly

innocent and perhaps benevolent, may restrain, when uttered under circumstances that make advice equivalent to command. For the essence of restraint is power; and power may arise merely out of position. Wherever a dominant position has been attained, restraint necessarily arises." (Mr. Justice Brandeis, dissenting, in *American Column & Lumber Co.* v. *United States*, 257 U.S. 377, 414.[36]

Since the record affirmatively shows—as the district court held (R. 762)—that the defendants' monopoly power was consciously acquired and not thrust upon them, there is no need for this Court here to consider the district court's view that "once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of § 2"; and that the defendant then has "the burden of showing that its eminence is traceable to such highly repectable causes as superiority in means and methods which are 'honestly industrial'" (R. 746; see, also, R. 745–746).

[36] The district court found (Fdg. 23, R. 752) that Mr. Fleming could recall only one instance in which "a board of directors of one of the affiliated defendants [had] ever vetoed, or rescinded, or overriden any of his or Grinnell's management proposals or plans." Fleming's testimony, however, was that he could recall only one instance in which the Grinnell-controlled board of directors had overruled a proposal of an alarm company management (R. 693–694). Although the court's finding on this point thus was erroneous, this error does not vitiate the conclusion that Grinnell controlled the alarm company defendants.

II. THE RELIEF GRANTED BY THE DISTRICT COURT IS INADEQUATE IN IMPORTANT RESPECTS AND INAPPROPRIATE IN OTHER RESPECTS

Before trial, the district court directed the government to file a brief setting forth its views as to the liability of each defendant "together with a specific draft of the relief sought," and directed the defendants to file a similar brief "stating their views with respect to the relief which would be appropriate in the event plaintiff prevails" (R. 133–134; see *infra*, pp. 98–100, for the circumstances in which the court adopted this procedure.) Although the defendants worded the introduction to their proposed decree as if it were a consent judgment (R. 151), their accompanying briefs make clear their understanding that they were expressing their "views on the relief which would be appropriate if plaintiff were to prevail on the question of liability" (R. 162; see R. 203).

In its brief and accompanying decree, the government proposed, *inter alia*, the following: that ADT be required to establish, in each of 48 different cities in which there was no competing accredited central station service, new central station corporations which would be fully equipped and capable of servicing a specified dollar volume of business, and that ADT then divest itself of the stock of those corporations; or, alternatively, that ADT sell and transfer specified amounts of service contracts. At the end of 10 years, unless the defendants could satisfy the court that effective competition had been restored or established in each of the 59 other cities in which ADT had a monopoly of accredited central station service, the

court was to enter such orders as it deemed necessary to create competition in these cities (Par. VIII, R. 142–143). Grinnell was to divest its interest in the alarm companies to persons not affiliated with any of the defendants (Par. IX, R. 143). The defendants were to be enjoined from entering into any service contract in excess of one year's duration (Par. V (E), R. 140). The defendants were to transfer to subscribers the title to equipment installed on their premises (Par. VII(A), R. 141). The defendants were to be required to sell upon nondiscriminatory terms any device they manufactured for use in furnishing central station protective service (Par. VII(C), R. 142). Finally, the government proposed that to aid enforcement it should have "visitation" rights, *i.e.*, the right to require reports, to examine pertinent documents, and to interview company personnel (Par. X, R. 143).

In their pre-trial submission to the court the defendants agreed that, if the United States prevailed, an appropriate decree would include the substance of all of these proposals, although they differed in matters of detail and degree. Thus, the defendants' proposed decree provided that part of ADT's business would be divested (Par. VIII, R. 157–159); that Grinnell would divest its interests in Holmes and AFA (Par. IX, R. 159–160); that no subscriber be required to contract for service in excess of one year and that contracts for longer periods contain an option giving the subscriber the right to terminate the contract at the end of any contract year (Par. V(E), R. 154); and that the defendants must offer such

subscriber upon entering into any new or renewal service contract the right to purchase all equipment installed in the customer's premises (Par. VII(A), R. 156). The defendants' proposed decree accepted in *haec verba* the government proposals (a) requiring the defendants to sell upon nondiscriminatory terms any device manufactured by them for use in their service, and (b) granting the government visitation rights (Pars. 7(c), X, R. 157, 160).

The district court withheld both the full relief requested in the government's proposals and even the more limited relief along the same lines which the defendants acknowledged to be appropriate. Without explaining why lesser relief was sufficient, the court entered a final decree enjoining all of the defendants from "restraining trade, or attempting or combining to restrain trade, in [the national market of insurance-accredited central station protective service] and from further attempting to monopolize, or conspiring to monopolize, or monopolizing that designated market" (R. 768). To "make this provision effective," the court ordered the alarm companies to file with the Department of Justice standard lists of prices and terms, and every quotation deviating from such lists (R. 768–769). The defendants were enjoined from acquiring the "stock, assets, or businesses" of enterprises in that market (R. 769). Grinnell was ordered to file, not later than April 1, 1966, a plan of divestiture of its stock in each of the alarm company defendants; it is given the option either to sell the stock or to distribute it to its share-

holders, or to combine or vary these methods (R. 769). The court further enjoined any of the defendants from employing in any capacity, the president and chairman of the board of Grinnell, James D. Fleming (R. 769).

Both the government and the defendants attack the decree. The government contends that the decree lacks several provisions which are necessary to accomplish the basic purpose of the suit—to "pry open to competition a market that has been closed by defendands' illegal restraints" (*International Salt Co.* v. *United States,* 332 U.S. 392, 401) and, "so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *United States Gypsum Co.,* 340 U.S. 76, 88). The defendants, on the other hand, contend that the decree is unduly harsh in some respects.

This Court has often pointed out that the relief decreed is the most significant phase of an antitrust case. *Gypsum, supra; United States* v. *duPont & Co.,* 366 U.S. 316, 323. While the district court has "the responsibility *initially* to fashion the remedy" in antitrust cases (*United States* v. *duPont & Co., supra,* p. 323, emphasis in original), the decree formulated by the district court is not "subject only to reversal for gross abuse" (*Gypsum, supra,* p. 89), but is subject to "the most careful scrutiny of this Court." *International Boxing Club* v. *United States,* 358 U.S. 242, 253; *United States* v. *Loew's, Inc.,* 371 U.S. 38.

Adequate relief in a monopolization case such as this should (1) put an end to the combination; (2) deprive the defendants of the benefits of their illegal conduct;

and (3) break up or render impotent the monopoly power which violates the Act. *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 128–129; *International Boxing Club* v. *United States*, *supra*. The district court's decree falls far short of accomplishing these objectives.

While we recognize that the defendants' pretrial proposals as to the relief appropriate if the government prevailed are not binding upon them or upon the district judge, they emphasize the inadequacy of the relief decreed in this case, for the defendants conceded the propriety of much of the relief sought by the government.

We shall first discuss the provisions which we believe the decree should contain, and then comment upon the defendants' objections to the present decree. If the court agrees with us that the case should be remanded for the district court to refashion the relief, it may find it unnecessary to determine the validity of some of the present provisions, since upon such refashioning the district court may no longer deem them appropriate.

A. THE DECREE IS INADEQUATE IN SIGNIFICANT RESPECTS [38a]

1. Divestiture of portions of ADT's business.

ADT, with 73 percent of the business done throughout the country by companies engaged in supplying accredited central station service, is the keystone of the defendants' monopoly power. The mere dissolu-

[38a] We do not now urge, as we did in our jurisdictional statement (p. 14), that the decree is deficient in permitting Grinnell to distribute its holdings in the alarm company defendants to its stockholders.

tion of the combination through the divestiture by Grinnell of its interests in the three alarm company defendants will not strike at the root of that power. Nor is the addition of a general injunction in the statutory language sufficient to cure the situation. As long as ADT retains its controlling share of the market, the chances of substantial improvement in the competitive situation in this business remain dim.

Indeed, in the district court Grinnell specifically acknowledged the validity of this contention. In its brief dealing with the relief to which the government would be entitled if it prevailed, Grinnell stated (R. 179):

> * * * defendants further agree with the Government that, if it were to prevail some further divestiture of ADT would be appropriate—*i.e.*, we agree that, in certain cities which can support two or more central stations but where ADT now provides the only central station service, an effort should be made to establish a healthy competitor * * *.

It further stated (*ibid*):

> * * * defendants are willing to agree that, unless sufficiently healthy competitive conditions then exist, ADT's share of service revenues in the United States may be cut to 50% by the end of the 10-year period following entry of a Final Judgment here. * * *

In 92 of the 115 cities in which ADT operates there are no other accredited central stations. Some of these cities apparently are natural monopolies in the sense that they cannot support more than one central station. On the other hand, the defendants recognized that 13 cities could support more than one central station (R. 161, 187, 222). The government had

suggested divestiture in 48 cities (R. 142, 144–149). Thus, the disagreement between the parties was not over the appropriateness of divestiture, but only over its scope.

The details of such divestiture—the particular cities in which it should occur, the amount of business to be divested, and the method of accomplishing it—are matters for the district court rather than for this Court. This Court need only hold that divestiture is appropriate.

The district court may have decided against divestiture on the theory that since the essence of the violation found was the combination among Grinnell and the three alarm companies, the ill effects of that monopoly could be destroyed by breaking up the combination and imposing injunctive and price-reporting provisions. The court apparently did not hold that ADT alone had monopolized the accredited central station business by acquiring and maintaining 73 percent of that business through restrictive and exclusionary practice. Had it so held—and it would have been warranted in doing so (*supra,* pp. 41–42)—divestiture of some of ADT's business surely would have been required. But the continued immunity of ADT from competition after the expiration of the restrictive 1907 agreements was in part attributable to the illegal combination (*supra,* pp. 68–71, 74). Therefore, proper relief, designed to cure the effects of the combination to monopolize, should include provisions to dissipate the unlawfully maintained monopoly power of ADT. In addition, even treating ADT only as a member of the combination that had monopolized through restrictive acts, the injury to the market

structure resulting from such monopolization is not cured by mere cessation of such acts and cannot be effectively remedied unless the economic power upon which the monopoly was based—ADT's predominant share of the market—is itself curtailed.

2. Limiting the terms of defendants' service contracts and requiring the sale of equipment of subscribers.

As we have shown (*supra,* pp. 79–80), two of the means by which ADT acquired and held its large share of the market have been requiring subscribers to sign five-year contracts and retaining title to the protection service equipment installed on subscribers' premises. ADT representatives have recognized the importance of such long-term contracts in excluding competitors; they frequently pointed to that fact as the justification for accepting substantial reductions in the standard rates (see the Statement, *supra,* pp. 21–22). ADT's installation charges for equipment—which ordinarily cover the cost of labor and equipment and the overhead, and also provide a profit—are sufficiently substantial that the subscriber is likely to be deterred from shifting his business when his contract expires by the knowledge that, if he does so, ADT will remove most of the equipment and thus compel him to pay another installation charge (see *supra,* p. 79). Since these practices thus constitute substantial barriers to competitors, relief against them is appropriate. Cf. *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295 (D. Mass), affirmed *per curiam,* 347 U.S. 521.

In the district court the government proposed that the defendants be enjoined from entering into serv-

ice contracts for more than one year, and be required to assign to subscribers the title to all equipment installed or to be installed on their premises (Pars. V(E), VII(A)). The defendants proposed "to give subscribers the option to buy equipment and the option of cancelling their contracts on any anniversary date thereof upon payment of fair compensation" (R. 178; Pars. V(E), VII(A), R. 154, 156).

ADT contends (Br. 182, 186–187) that prohibiting it from offering five-year contracts would put it at a competitive disadvantage vis-a-vis non-defendant firms who can offer such contracts, and would be unfair to defendants' customers who desire such contracts. As to the first point, since the defendants were found to have violated the law, they may properly be subjected to restrictions to which non-violators are not subject. *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 723–724.

As to the second, if the defendant's customers do in fact wish such contracts (and ADT points to nothing in the record to indicate that they do), that is a matter for the district court to consider on remand in framing the relief on this point. Although this consideration might induce the district court to give customers the option to enter into contracts for more than one year, it certainly does not justify the defendants in requiring them to do so.

The defendants also argue that the underwriters require central stations to retain title to equipment as a condition to accreditation. The standards for accreditation of the National Board of Fire Underwriters state that central station systems "shall be independently owned, controlled, and operated by a person,

firm, or corporation whose principal business is the furnishing and maintaining of supervised protective signaling service and who have no interest in the protected properties" (GX 1, R. 792). Similarly, the standards of the Underwriters Laboratory for central station burglary alarm systems states that such systems "are independently owned, controlled, and operated by a person, firm, or corporation engaged in furnishing such supervised protective signaling service and having no interest in the protected property" (GX 3, R. 848).

The testimony of the underwriters' representatives, however, does not show that they consider such ownership so essential to the proper functioning of central station systems that they would necessarily refuse accreditation if ownership were transferred to the subscribers (GX 317, R. 2378–2381; GX 346, R. 2996–2999; GX 352, R. 3072–3075). Indeed, the manager of the Factory Mutual Rating Bureau, a group of seven insurance companies specializing in fire and allied insurance for "large industrial tasks" (GX 348, R. 3020), stated (*id.*, p. 3025): "We are not at all concerned actually with who owns the equipment, as long as it is approved equipment and is functioning properly." In any event, these are matters which may be explored by the district court on remand.

3. Selling equipment upon non-discriminatory terms.

The government proposed that the defendants should be required to sell upon non-discriminatory terms any devices manufactured by them for use in furnishing central station service (Par. VII(C),

R. 142). The defendants accepted this proposal in the exact wording which the government proposed (Par. VII(C), R. 157), but the district court gave no explanation for its rejection.

This provision is necessary for effective relief. ADT manufactures many of the protective devices used in the defendants' protection systems (GX 309, p. 3; GX 313, pp. 5–7). If competitors are to be able to compete effectively for defendants' existing customers as service contracts expire, they must be assured of replacement parts to maintain those systems. Moreover, competition for new customers should not be limited by the inability of competitors to obtain needed equipment and parts. Finally, if ADT is required to divest part of its business, the competitors thus created must be assured of a supply of parts to maintain the systems they acquire.

4. Visitation rights.

As with the government's proposed requirement for selling equipment upon non-discriminatory terms, the defendants accepted in the exact language suggested the government's proposal for visitation rights, *i.e.*, requiring reports, examining documents, and interviewing company personnel (Par. X, R. 143, 160).

In *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 95, the Court held that the government was entitled to similar relief "for the purpose of advising itself as to the defendants' compliance with the judgment." See, also, *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 726–728; *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 433. There is no reason

why the government should not have the same rights here.

The district court gave no explanation for its refusal to grant such relief. Perhaps it concluded that the kind of decree it entered did not call for government participation in its enforcement. If the Court agrees with us that further relief is necessary, the district court should at the least be given an opportunity to reconsider this point in the light of the new decree.

B. THE DECREE IS INAPPROPRIATE IN SOME RESPECTS.

1. The prohibition upon the defendants' employment of Mr. Fleming.

The district court prohibited any of the defendants from employing Mr. Fleming, the president of Grinnell, in any capacity after April 1, 1966. The court had anticipated this provision when, after Mr. Fleming had testified, it stated (R. 698) that "if I frame the Decree involving relief, I may consider appropriate an injunction against the defendants continuing to employ officers or employees whom I find have either deliberately or negligently participated in violations of the Anti-Trust Act." The court subsequently held (R. 767) that Mr. Fleming had been "for well over a decade and a half the vigorous captain of the defendants' conspiracy to monopolize."

There may be situations where, because of a high corporate officer's active and personal participation in predatory conduct violating the antitrust laws, it might be appropriate to bar him from further connection with the firms that committed such offenses. In the present case, however, the record does not show

such participation by Mr. Fleming. Rather, the district court's theory appears to be that Mr. Fleming, who was the dominant figure in Grinnell, was aware of the defendants' monopolization but failed to take steps to correct it. We do not believe that this is a sufficient basis to justify relief of such severity.

2. The general prohibition in the statutory language.

The district court broadly enjoined the defendants "from further restraining trade, or attempting or combining to restrain trade * * * and from further attempting to monopolize, or conspiring to monopolize, or monopolizing * * *" (R. 768). In *Schine Chain Theatres* v. *United States,* 334 U.S. 110, 125–126, this Court condemned a similarly sweeping provision—one against " 'monopolizing' first- and second-run films"—on the ground that "[t]he precise practices found to have violated the act should be specifically enjoined." See, also, *Swift and Company* v. *United States,* 196 U.S. 375; 276 U.S. 311, 328. On the remand of this case we suggest that it would be appropriate for the district court to replace or implement this general provision with a more specific enumeration of the precise practices that are prohibited.

* * *

The defendants challenge three other provisions of the decree: (1) that Grinnell divest itself of its stock in the three alarm company defendants; (2) that the defendants acquire no interest in firms in the accredited central station business; and (3) that the alarm company defendants report to the Department

of Justice any deviations they make from list prices (R. 768–769).

The first provision is fully justified. Grinnell having engaged in illegal monopolization by combining in a single source the market shares of the alarm company defendants, the appropriate relief is to dissolve the combination by divestiture of Grinnell's interest in those companies. For the decree must "effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about." *Standard Oil Co.* v. *United States,* 221 U.S. 1, 78; *International Boxing Club* v. *United States, supra; Schine Chain Theatres* v. *United States, supra; United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 189.

The prohibition against future acquisitions similarly lay within the court's discretion.[36b] Since acquisition was one of the methods by which the alarm company defendants acquired their market power, and the method by which Grinnell put the combination together, an injunction against repetition of the practice was warranted. Moreover, if the Court agrees with us that some divestiture of ADT's business is required, it would be anomalous indeed if ADT were permitted to offset such diminution of its

[36b] The court's prohibition goes somewhat beyond the government's proposal. We proposed that the defendants be prohibited from acquiring any interest in a central station firm operating in any area where any defendant is furnishing or attempting to furnish service, and from acquiring any such interest in any other area except upon establishing that such acquisition will not substantially lessen competition or tend to create a monopoly (Par. V(C), R. 140).

market power through new acquisitions, or if AFA and Holmes, two other members of the illegal combination, were permitted to acquire portions of the business to be divested by ADT. The possibility of future acquisitions is not mere speculation. Between 1955 and 1961 the alarm company defendants sought to acquire at least eight companies, and when this suit was filed in 1961 each of those defendants had a purchase offer outstanding (*supra,* p. 12). Although the prohibition is not restricted in time, any of the defendants may of course apply to the court for modification to permit any particular acquisition.

The third provision would appear to be a matter within the discretion of the trial court; upon the remand, however, the court might deem it inappropriate or unnecessary in the light of the new decree to be entered.

III. JUDGE WYZANSKI WAS NOT PERSONALLY BIASED AND PREJUDICED AND DID NOT DENY THE DEFENDANTS A FAIR TRIAL

All the defendants, but particularly Grinnell, contend (Grinnell Br. p. 50–86, ADT Br. p. 161, Holmes Br. p. 8–12, AFA Br. p. 44–46) that Judge Wyzanski was personally biased and prejudiced and therefore should have been disqualified from deciding the case; and that in any event he denied them a fair trial. The facts upon which the defendants base these contentions, however, completely refute them.

A. THE CLAIM OF PERSONAL BIAS AND PREJUDICE

1. a. The complaint in this case was filed in April 1961 (R. 30), the defendants filed their answers in July 1961 (R. 41, 51) and the taking of extensive dep-

ositions began in August of that year (R. 87). In January 1963 the district court directed that no depositions be taken after September 1, 1963, and that by October 1, 1963 the government furnish the defendants with the names of the witnesses it expected to call (R. 87, 90). When the court at that time asked government counsel whether he would be ready for trial in November 1963, he replied that he would not like to have the date set but that he "would hope that we could have a date like that * * *" (R. 89).

In response to the court's inquiry in September 1963 as to when the parties would like the case to be heard (R. 109), both sides suggested that the trial not be set earlier than January 1964 (R. 110–112). At the same time the government informed the court that, in accordance with its suggestion of January 10, 1963, the parties were then negotiating over a possible consent decree settlement of the case, and that the outcome of such negotiations would be known early in November 1963 (R. 112).

b. At a pretrial conference on December 18, 1963, government counsel (Mr. Story) stated that although the parties had "reached some agreement on some of the issues * * * [they] are still quite a ways apart," and that he wanted to "find out how your Honor would like to handle the presentation of this case in the event we are not able to get together on settlement of the case in the near future" (R. 119). Grinnell's counsel (Mr. McInerney) suggested that, discovery having been substantially completed, "the next more appropriate stage, rather than burdening your Honor with ruling on the admissibility of evidence, would be a pretrial on the question of relief as recommended

by the Judicial Conference Handbook * * *" (R. 125).[37] The court stated that it understood the suggestion as "an invitation to the Court to participate in a discussion of relief without addressing itself to the merits" (R. 126). Government counsel opposed the suggestion, stating that the court could participate intelligently in consent decree negotiations only if it had "a certain amount of knowledge of the factual situation here" (R. 126).

The court then stated that it "would be very helpful in this situation" for each side to submit a brief setting forth its views of the facts relating to liability and what relief would be appropriate if the government prevailed; "[a]t that stage I would be quite prepared to hold a conference directed primarily to problems of relief rather than to problems of ruling upon the admissibility of evidence or other objections" (R. 128). The court warned the defendants, however (R. 129):

> In such a situation it is quite true that the defendants are running some risk because the Court necessarily in talking about such matters will not know whether the government's contention in interpreting the facts is correct or the defendants' interpretation of the facts is correct or some middle course is correct, and presumably, if the Judge makes any suggestion, he will have to make it on the basis of the strongest possible showing of the government.

[37] In its *Handbook of Recommended Procedures for the Trial of Protracted Cases*, pp. 46–47, the Judicial Conference stated that "[f]rank discussion * * * of the government's objectives in civil antitrust cases may aid the trial judge in appraising the relevance and—more important—the significance of the proofs which are offered."

> That is to say, if the government believes that it has very strong evidence with respect to violation and points to particular pages in the Depositions and particular documents and particular answers to interrogatories or what-not, at the stage of the discussion which I foresee under Mr. McInerney's proposal, I would have to go very far in assuming that there is something to what the government says. [R. 129–130.]

The court then stated that "if the defendants want to find out how I feel about the matter, if the government's case stands uncontradicted, that is up to them" (R. 130). In response to the court's statement that "as I understand it, you want to find out what kind of relief I would be likely to allow if the government's case stood virtually uncontradicted," Grinnell's counsel replied: "That is what I had in mind, your Honor, yes" (R. 131).

On the same day the court entered an order providing, among other things, that briefs be filed as suggested at the hearing, and that a pretrial conference would be held after April 13, 1964 (the date fixed for the filing of the last of such briefs), "for the primary purpose of discussing the relief which would be appropriate in the event plaintiff prevails" (R. 133–134).

c. The next pretrial conference was held on May 28, 1964. After the court had decided an issue involving the impounding of certain documents (R. 253–255), it asked: "Is there anything else? Is there anything other than setting the date for trial?" (R. 255). When Grinnell's counsel stated "Your Honor, at our last pretrial conference we discussed devoting

this pretrial conference primarily to the question of relief," the court replied: "Is there any use in my talking about it? Are you near enough so that I can do anything? Or hadn't I just better hold the trial and get it over with? It is not going to take very long. I know that" (R. 255). Grinnell's counsel stated that "if your Honor would indicate the relief that might be appropriate in this case that that would help both sides to come to a better understanding" (R. 256), and the following colloquy occurred (*ibid.*):

> The COURT. I don't think it would help very much.
>
> Mr. MCINERNEY. Well, your Honor, I think it would help both the plaintiff and the defendants to know what is really at stake here in this trial.
>
> The COURT. I assure you that you would not be helped by anything I would say. You would do better to get together with the government rather than run the risk of what I would say from what I have seen. Let me just assure you of that. * * *

The court then set the case for trial on June 15 (18 days later).

When Grinnell's counsel sought to argue further, the court stated: "There is no use in discussing it with me. I have read enough to know that if I have to decide this case on what I have seen from the government you will not be in a position at this stage to agree to it" (R. 256).

d. On June 2, 1964 the defendants filed a motion seeking (1) to continue the trial for at least two months and (2) to narrow the issues to be tried (R.

258–269). At the hearing on this motion on June 3, 1964, the defendants first argued in favor of postponing the trial, urging that they needed the additional time to complete their preparation (R. 272–277). Government counsel opposed the postponement, arguing that there had been both extensive discovery and lengthy consent decree negotiations, that the defendants had been on notice since November of the evidence upon which the government intended to rely, and that since February 1 "the defendants have had our trial brief in which we have clearly stated the issues" (R. 277–278). The court denied the motion to postpone (R. 279). When Grinnell's counsel then pressed the second branch of the motion—"to limit the relief issues to be tried herein to those raised by the pleadings so as to eliminate what we consider the extraneous issues raised by the government's proposed judgment herein" (R. 281)—the court replied (R. 281–282):

> I can't understand frankly why you don't realize that you have forced me to look at the documents in this case, which I dislike doing in advance of trial. You have invited me, therefore, into what I regard as, from your point of view, a rather undesirable situation. I think I made that clear at the beginning. I have told you that, forced by you to look, my views are more extreme than those of the government; and I have also made you realize that if I am required to make Findings and reach Conclusions I am opening up third-party suits that will make, in view of the size of the industry,

the percentage of people involved higher than in the electrical cases.

The court further stated that "anyone who looks at this record will say that Mr. Story did not exaggerate by one jot the situation" (R. 282).

e. On June 9, 1964 the defendants filed a motion under 28 USC 144 for the disqualification of Judge Wyzanski on the grounds of personal bias and prejudice (R. 286). Attached to the motion were two affidavits (R. 287–298) which discussed the pretrial hearing and order of December 18, 1963, quoted extensively from the transcript of the hearings of May 28 and June 3, and stated on the basis thereof that "it now appears that the Court has concluded that any trial of this case will result in a finding of liability" (R. 297). Judge Wyzanski referred the question of his disqualification to Chief Judge Woodbury of the Court of Appeals for the First Circuit, by whose designation he was hearing the case (R. 299). After hearing oral argument, Judge Woodbury held: (1) that the affidavits of bias and prejudice were "insufficient in law and fact" and (2) that insofar as they sought to invoke Judge Woodbury's supervisory power to designate another judge to hear the case, there was "no adequate basis for concluding that Judge Wyzanski is disqualified by bias and prejudice to proceed further in the case" (R. 318).

2. The foregoing facts, which were the basis of the defendants' motion to disqualify, were insufficient to establish personal bias and prejudice under 28 USC 144. That statute provides that whenever a party in a district court proceeding files a "timely and sufficient

affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings"; it further requires that the affidavit "shall state the facts and the reasons for the belief that bias or prejudice exists." When such an affidavit is filed, the only question is whether, assuming the correctness of the facts alleged, they are legally sufficient to show "personal bias or prejudice." *Berger* v. *United States,* 255 U.S. 22.

A judge is not personally biased and prejudiced within the meaning of this provision because of opinions or judgments that he has formed on the basis of the proceedings or evidence in the case before him. "[T]he bias or prejudice which can be urged against a judge must be based on something other than rulings in the case" (*Berger* v. *United States, supra,* p. 31). To be disqualifying, the alleged bias and prejudice must be against the defendant personally, *i.e.,* it must stem from some extra-judicial source and must lead the judge to form an opinion as to the merits of a particular legal controversy on some basis other than what he has learned through his participation in the case. *Berger* v. *United States, supra; Ex parte American Steel Barrel Co.,* 230 U.S. 35; *Lyons* v. *United States,* 325 F. 2d 370 (C.A. 9); *Gallarelli* v. *United States,* 260 F. 2d 259 (C.A. 1); *Craven* v. *United States,* 22 F. 2d 605 (C.A. 1), certiorari denied, 276 U.S. 627; *United States* v. *Garden Homes,* 113 F. Supp. 415 (D. N.H.), affirmed *per curiam,* 210

F. 2d 281 (C.A. 1); *United States* v. *16,000 Acres of Land*, 40 F. Supp. 645 (D. Kan.). "[I]mpersonal prejudice resulting from a judge's background or experience," [38] his "comments and criticisms," [39] "indiscreet expressions," [40] irritation at a party's dilatory tactics,[41] or hostility toward counsel,[42] do not establish the *personal* bias and prejudice which the statute requires for disqualification. *A fortiori*, an opinion formed from the evidence in the case cannot ground a charge of personal bias and prejudice. *Ryan* v. *United States*, 99 F. 2d 864 (C.A. 8), certiorari denied, 306 U.S. 635; *United States* v. *16,000 Acres*, *supra*.

Judge Wyzanski's statements reflected no personal bias and prejudice against the defendants. They showed only that, upon examining the briefs on relief, as the defendants had requested him to do, he had concluded that if the facts were as the government had alleged, the case was a strong one which would call for stringent relief—relief which he believed the defendants "will not be in a position at this stage to agree to" (R. 256). He prefaced this statement with the qualification that "*if* I have to decide this case on what I have seen from the government" (R. 256,

[38] *Eisler* v. *United States*, 170 F. 2d 273 (C.A.D.C.), certiorari dismissed, 338 U.S. 883; *Price* v. *Johnston*, 125 F. 2d 806 (C.A. 9), certiorari denied, 316 U.S. 677.

[39] *Scott* v. *Beams*, 122 F. 2d 777 (C.A. 10), certiorari denied, 315 U.S. 809.

[40] *In re Lisman*, 89 F. 2d 898 (C.A. 2).

[41] *Refior* v. *Lansing Drop Forge Co.*, 124 F. 2d 440 (C.A. 6), certiorari denied, 316 U.S. 671.

[42] *Sanders* v. *Allen*, 58 F. Supp. 417 (S.D. Calif.).

emphasis added), and he did not indicate, or even suggest, that he had decided to hold for the government.

The judge's comments at the June 3 hearing similarly did not disclose either personal bias and prejudice or prejudgment of the case. He again indicated that any views he had of the case were formed through his examination of the factual material the government had submitted, in consequence of the defendants' proposal (R. 281–282). As previously noted, an opinion thus formed does not show personal bias and prejudice. Read in context and in the light of what Judge Wyzanski had stated at the prior hearing, his statement that "my views are more extreme than those of the government" (R. 281–282) meant only that, if the government could establish its factual contentions, he would grant more stringent relief than the government had proposed. The reference to possible private damage suits that would result if he were "required to make Findings and reach Conclusions" (R. 282) was to the fact that, if the government could prove the case that it had developed in its brief, the resulting findings of violations could lead to a substantial volume of treble damage litigation. The comment that "anyone who looks at the record will say that Mr. Story did not exaggerate by one jot the situation" was made in response to Grinnell's counsel's complaint that the government was "rais[ing] the stakes just before the case goes to trial" (R. 282). It referred to Mr. Story's contention, made a few minutes before (R. 277–278), that the defendants had had sufficient notice of the government's contentions

so that there should be no further delay of the trial."[43]

Nor can any inference of personal bias and prejudice be drawn from the court's action in setting the case for trial in 18 days. Although there had been no indication prior to May 28 that the court was planning to set a trial date at that time—indeed, the December 18, 1963 order had indicated that the hearing would be held primarily for discussing relief problems—the court had inquired earlier in the May 28 hearing whether there was "anything other than setting the date for trial?" (R. 255). In view of the court's conclusion that the defendants would find completely unacceptable the relief which the court believed would be necessary if it held for the government on the basis of the facts which the latter had presented—and the court had seen both the government's proposed judgment and the defendants' counter-proposals and objections (R. 134–250)—there was no occasion for the court to indicate what relief it had in mind. Thus, the next step to be taken was setting a trial date.

Although the 18-day interval which the court set was rather short, it was understandable in the circumstances. Extensive pretrial proceedings had long since been completed; the defendants had been on notice for several months of the witnesses the gov-

[43] Grinnell's counsel apparently so understood the statement, since he immediately replied (R. 282): "I respectfully disagree both with your Honor's statement and Mr. Story's statement to the effect that it is not at the last minute. Mr. Story says that he clarified the issues over a year ago, and this is not so with respect to the relief requested. We knew that some of these demands for relief would be made but not all of them."

ernment intended to call, the documentary evidence it intended to introduce and the legal and factual theories upon which it relied; and the parties had indicated in September 1963 that apparently they would be ready to go to trial by January 1964 (see R. 109–112). The court's action thus reflected its view that there should be no further delay in the trial of a case in which the complaint had been filed more than three years earlier and in which the state of pretrial preparation indicated that the parties should be able to go to trial promptly. The court may have acted somewhat strictly in requiring the defendants to go to trial so quickly; but doing so at worst reflected only misapprehension as to the completeness of their trial preparation, not personal bias and prejudice against them. See the further discussion of the court's setting the case for trial, *infra*, p. 114.

3. The defendants further contend that certain statements which Judge Wyzanski made during the trial showed that he had prejudged the case and had decided to hold for the government without regard to what the evidence showed. After the presentation of the evidence had been completed, however, Judge Wyzanski explicitly stated—not once, but several times—that he had not made up his mind how he would decide the case. Thus, immediately after both sides had rested, he stated (R. 697):

> I notify you in advance as firmly and clearly as possible that I intend if I should find, and I underline the words, 'if I should find, and underline it four times, in favor of the Gov-

> ernment, I shall deal in my final stage with not merely questions of liability but questions of relief, so that the Findings, Conclusions and Decree will cover relief or remedy, if appropriate, as well as liability, if any.

He immediately repeated the point that he had not decided the outcome stating "[s]hould I deal with the problem of relief," "If I should find a violation with respect to monopolization," and "if I frame the decree involving relief" (R. 697).

Moreover, during the post-trial argument (held after additional briefs had been filed), at which there was extensive colloquy between the court and counsel, the court stated: "I don't want by any of my statements to imply that I have decided that the government is entitled to win this case," to which Grinnell's counsel responded, "I appreciate that" (R. 729); that "in the event I should decide adversely to the defendants * * *" (R. 729); and that "you need not worry that I am going to think about any problem with respect to relief unless and until it becomes necessary to do so" (R. 730).

It is in the light of these repeated explicit statements by the court that it had not made up its mind how it was going to decide the case, that the court's comments upon which the defendants rely to show prejudgment must be evaluated. Thus viewed in context, they do not support the claim of prejudgment.

a. The defendants contend that the judge's use of the phrase "a great ceremonial act" shows that he viewed the whole trial as a formal gesture that would not influence an already closed mind. In context,

however, the statement carried no such implication. The defendants were trying to demonstrate that it was important that a central station hold title to the equipment situated on the subscriber's premises (R. 373–375, 376). Judge Wyzanski told the witness that "[f]rom the witness box you are making an argument of an economic character which has been specifically rejected by the Supreme Court of the United States * * * the extent to which your testimony is apt to persuade this trier of fact is somewhat limited in the light of the restrictions imposed upon him by precedents more recent than Chief Justic White" (R. 375). When Mr. Fritz, trial counsel for the alarm company defendants, continued this line of questioning (R. 376–377), Judge Wyzanski told him (R. 377):

> Mr. Fritz, what do you gain by these leading questions and answers over an extended statement of ten pages in your brief about the great merits of this system? Do you think you will persuade me one bit more by this kind of testimony? Maybe you will persuade somebody else. And if you think so, all right. I just assure you it is a great ceremonial act, as far as I am concerned.

In other words, the court viewed the introduction of "This kind of testimony"—evidence of the desirability of a particular practice of the defendants—as "a great ceremonial act" in the sense that it deemed the evidence irrelevant to the issues in the case.

b. Although the judge frequently indicated that he believed that much of the evidence the defendants were offering was irrelevant, he uniformly admitted it—primarily on the ground that this Court might disagree. See, *e.g.*, R. 395, 442, 492. (On one occasion

he stated that "I am going to allow the defendants to put in the kitchen sink" (R. 442)). But whatever the correctness of Judge Wyzanski's views about such evidence, their expression did not show any prejudgment of the case. This is demonstrated by the judge's statement that "I know very well where I come out" (R. 376)—a statement which the defendants, taking it out of context, contend (Grinnell Br. 60) demonstrates that the judge intended to ignore the record he was allowing them to build. The statement was made just before the comment about "a great ceremonial act," and related to the same line of questioning. The judge's full comment was (R. 376):

> Mr. Fritz, I am not going to prevent you from offering it, I am merely telling you that so far as I am concerned I know very well where I come out on this believing myself to be bound.
>
> Now, you, of course, are free to build the record hoping that some other more enlightened judge will have a more sympathetic view. I am not saying that in any other sense than telling you that I know where I come out not because I have, as has been suggested, a bias except that kind of bias which emanates from prior experience in this field, the kind of bias which constitutes judgment.

Judge Wyzanski merely was stating his view that under decisions which "bound" him the evidence was irrelevant, and that was "where I come out on this," *i.e.*, he therefore would not consider the evidence.

c. The foregoing is typical of several instances in which the judge candidly stated his view of the law and the immateriality thereunder of certain kinds of evidence the defendants were presenting. Thus, when

he stated that he deemed irrelevant "that kind of economic argument which is addressed to what used to be the Rule of Reason" (R. 391), this was a reference to evidence concerning "the peculiar situation of this industry and the necessity of otherwise prohibited practices being followed in this industry because of the connection between health, welfare, education, fire and other things and this particular set of alarms" (R. 391). His statement (R. 530) that "[t]his is an exercise in trying to persuade Congress or five Justices of the Supreme Court but it won't have the slightest effect on me" (R. 530) reflected the same approach. The defendants were offering testimony that ADT's ownership of equipment on subscribers' premises had resulted in the company spending substantial sums to restore systems ruined by floods (R. 528–530), and the comment referred to his prior statement at R. 391, quoted above.

d. Nor can any inference of bias and prejudice be drawn from certain statements which Judge Wyzanski made on the opening day of trial (June 15, 1964). He there stated that he viewed certain statements of counsel as an "offense and a reflection at an earlier stage because they are based upon the assumption that I gained information from some other source or other circumstances than by our demand that I should read these documents" (R. 335); that "[y]ou yourselves put on me the burden of forming an opinion and I did form one" (R. 336); that the excerpts from the hearings of May 28 and June 3 upon which the defendants had based their motion to disqualify "did not tell the whole story because over my strong reluctance you insisted that I should hold a case in suspense so

that you could confer about a possible settlement and that I could look at the papers with respect to the matter" (R. 336); and that "[y]ou proceeded to disqualify two Judges and sought to disqualify the third on the eve of a trial that had been postponed for nine months" (*ibid.*).

The first two of these statements make substantially the same points that the judge had made at the May 28 and June 3 hearings, and they similarly do not show bias and prejudice. See *supra*, pp. 105–107. There is nothing in the record which supports the third statement that the pretrial submission of briefs as to relief was done over the judge's "strong reluctance." On the contrary, at the hearing on December 28, 1963 he had stated that he viewed the proposal as "very helpful in this situation" (R. 128). The court also erred in assuming that the defendants were responsible for the disqualification of the two other judges who previously had been assigned to hear the case. Defense counsel immediately pointed out this error, however, stating that "the disqualification of the two prior Judges was purely voluntary on their part and had nothing to do with any of us" (R. 336). These two statements reflected merely misapprehensions about minor aspects of the case, and not any prejudgment of the merits.[*]

[*] A third minor factual error was even less significant. At a hearing on a motion to quash subpoenas, held on the opening day of trial (June 15, 1964), counsel for the alarm company defendants noted for the record his objection to going to trial at that time (R. 323–324). In response, the court stated (R. 324) that it had set the matter for November, 1963, "and has from time to time postponed it to meet the convenience of counsel." The record does not show that the case had been set for November, 1963, but only that in January 1963 the court

B. THE DEFENDANTS WERE NOT DENIED A FAIR TRIAL

The defendants' argument that they were denied a fair trial rests largely upon the same contentions that underlie their claim that the court had prejudged the case. We have already discussed and demonstrated the lack of merit to those contentions. The defendants make two additional contentions on this point, neither of which has substance.

1. The defendants contend that they were denied a fair trial because they were required to go to trial on 18 days notice. We have previously shown (*supra*, pp. 107–108) that, in view of the extensive pretrial proceedings that had been conducted in the three years since the complaint had been filed and the complete disclosure of the government's case that had been made, the court's action in setting the case for a prompt trial, while perhaps unexpected, was not unreasonable. The fixing of a trial date is, of course, within the discretion of the trial court, and the court did not abuse its discretion here.

In any event, the defendants have not demonstrated that they suffered any prejudice from going to trial on 18 days notice. They point to no evidence that they were precluded from presenting because of lack of time to complete its preparation. On the contrary, they presented an exhaustive case, calling 31 witnesses and introducing 773 exhibits and excerpts from 47 depositions. Indeed, they did not even make any offer of proof at the trial as to evidence that they would have presented if they had additional time.

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had asked government counsel whether he would be ready to go to trial by November, and that the latter had stated that he could not say, but "would hope that we could have a date like that" (R. 89).

2. The defendants also challenge the court's action in admitting all the government's evidence, which was entirely written, in bulk, and in refusing at that time to rule on the numerous objections which they filed to particular items. The court first admitted 307 documentary exhibits (R. 329–330), and then excerpts from 38 depositions (R. 333, 335). Defense counsel filed written objections to both groups of exhibits (R. 328–329, 338–339), which the court stated it would consider when it drafted its decision, on the ground that after it had the total picture it would be in a better position to rule upon the particular objections (R. 340). When defense counsel objected that many of the depositions contained improper hearsay evidence and referred to an example, the court replied (R. 339): "I should like to make it quite clear that I have no intention whatsoever of resting my findings, conclusions, or judgment upon the type of hearsay illustrated just now by Mr. McInerney." The court further stated (R. 340) that "The protection which the defendants will have is that they may be sure that on any vital matter in the case I shall not put in a mere summary method my findings, conclusions, or judgment but, *where appropriate or necessary,* I shall key to particular documents or other exhibits or pages of the transcripts such support as there may be for such findings, conclusions, or judgment as I enter" (emphasis added).

Grinnell contends (Br. 62, 64) that this admission of the government's evidence "en masse" was a "symptom of the trial judge's haste to conclude these proceedings." The fact is, however, that the procedure which the judge followed was the culmination of carefully drawn pre-trial procedures which sub-

stantially shortened both the length of the trial and the volume of evidence that customarily could be anticipated in a "big case" such as this.

In many of such cases the number of exhibits has ranged from 900 to 10,600;[45] in the *United Shoe Machinery* case, which had been tried before Judge Wyzanski about ten years earlier, the trial took 121 days, and 5512 exhibits totalling 26,474 pages were offered in evidence. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 299 (D.Mass.), affirmed, 347 U.S. 521. In the present case, in contrast, the trial took only six days; the government's entire case was written; and although the parties introduced 1080 exhibits and excerpts from 85 depositions, the government's case comprised only 307 exhibits and portions of 38 depositions.

By receiving the government's documents in bulk, the court avoided protracted argument over narrow and often repetitive points. In admitting the documents, the court stated (R. 327): "They will not be considered of course in bulk. But all have been before you, all of them have been analyzed, and it is a matter of convenience to have them presented in bulk. I will of course regard them individually." This procedure enabled the court to defer making a definitive ruling as to the significance of each document until it had considered the entire case and viewed each item of evidence in its relationship to the others. Since the case was tried before the court and not before a

[45] See Report of the Committee to the Judicial Conference of the United States, *Procedure in Antitrust and Other Protracted Cases*, 13 F.R.D. 62, 63.

jury, the defendants were not prejudiced by the mere admission of the material.

Although the district court stated that, "where appropriate or necessary," it would key its findings and conclusions to particular portions of the record, it did not do so. It therefore must have concluded that such references were not "appropriate or necessary," *i.e.*, that there was . . question as to the admissibility of the evidence supporting the findings. In preparing its brief the government has taken great care to rely only upon evidence that is clearly admissible under settled principles and we believe that this evidence supports the district court's findings of violation. This Court, upon reviewing the record, will of course reject any evidence that it concludes was improperly admitted.[46]

* * *

Judge Wyzanski obviously has some definite views about the antitrust laws and the kind of evidence that is appropriate in antitrust cases. He is quite outspoken in his views on many matters, including the trend of decisions of this Court. But the expression of those views from the bench—often put in some-

[46] When the question of admitting the 307 documents was under discussion, defense counsel stated that documents of one defendant were not admissible against the others "until the so-called conspiracy is proved as an independent fact" (R. 327). The court immediately responded (*ibid.*): "I am satisfied from my examination of the documents that a prima facie case has been made for the admissibility on the conspiracy theory." Whether or not the district court was correct in that conclusion, the government does not rely upon the statement of any defendant to establish the liability of the others.

what unconventional and colorful terms (R. 371; see, also, R. 396, 428, 446, 544)—does not show that the judge based his decision on something other than the evidence in the case, and provides no basis for overturning an otherwise valid decision. *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 331; *Scott* v. *Beams,* 122 F. 2d 777 (C.A. 10), certiorari denied, 315 U.S. 809; *In re Lisman,* 89 F. 2d 898 (C.A. 2); *Refior* v. *Lansing Drop Forge Co.,* 124 F. 2d 440 (C.A. 6), certiorari denied 316 U.S. 671; *Foster* v. *Medina,* 170 F. 2d 632 (C.A. 2), certiorari denied, 335 U.S. 909; *Sanders* v. *Allen,* 58 F. Supp. 417 (S.D. Calif.).

CONCLUSION

The judgment of the district court should be affirmed insofar as it determined that the defendants violated Sections 1 and 2 of the Sherman Act, but the case should be remanded to that court for further proceedings with respect to relief.

Respectfully submitted.

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MARCH 1966.

APPENDIX

CHARTS AND GRAPHS COMPARING THE PERCENTAGES OF MINIMUM BASIC RATES OBTAINED BY ADT IN CITIES WHERE IT HAS ACCREDITED CENTRAL STATION COMPETITION AND IN CITIES WHERE IT HAS NO SUCH COMPETITION

The first two charts (pp. 120–121) compare installation and service charges in ten cities in each category.

The next chart (p. 121) presents in tabular form the data in GX 222 (R. 2033–2038) relating to installation charges. The first column represents the percentage of ADT's standard installation charges it received in the indicated number of cities for the years between 1957 and 1961, counting each city for each year as one item. The second column represents the number of cities and years in which ADT received the percentage shown in the first column. For example, in Akron ADT received 90 percent of its standard installation charges in each of the years 1951 through 1961. Thus Akron represents 5 items in the "90 percent and over" bracket in the chart. The third column presents the percentage of items occurring in any bracket and the fourth column cumulates these percentages. Each column compares cities where ADT had competition from another accredited central station with those where it had no such competition.

The same information is presented in the graph on p. 122.

The next chart and graph (pp. 123–124) present the same information for service charges.

CHART 1

Comparative summary of percentage of standard service charges secured

CITIES WITH ACCREDITED CSPS COMPETITION

	1957	1958	1959	1960	1961
Boston	87.7	89.1	96.6	90.3	87.9
Cincinnati	82.4	81.6	63.3	52.6	53.6
Dallas	27.5	32.6	44.9	41.3	50.6
Dayton	78.9	69.3	58.5	42.0	43.7
Denver	92.7	80.9	83.9	79.9	70.3
Houston	64.9	63.7	68.5	67.9	63.9
Los Angeles	77.6	67.9	60.0	55.9	57.4
Milwaukee	77.0	36.3	55.0	57.2	58.5
Philadelphia	91.4	82.0	72.0	88.2	61.2
St. Louis	75.6	55.3	73.1	80.4	67.3

CITIES WITHOUT ACCREDITED CSPS COMPETITION

Atlanta	92.1	97.8	96.6	92.4	90.9
Buffalo	96.7	100.8	99.5	98.9	98.2
Louisville	80.7	95.1	88.9	99.2	88.9
Memphis	81.2	95.1	80.04	98.8	97.0
Miami	96.8	96.6	104.3	101.0	93.2
New Orleans	94.2	95.9	97.0	100.1	94.8
Omaha	93.1	99.8	98.2	91.8	96.7
Portland, Ore	97.5	83.0	107.6	100.4	89.5
Salt Lake City	103.9	101.9	105.6	97.5	100.7
Seattle	103.0	99.7	102.2	101.1	98.7

Comparative summary of percentage of standard service charges secured

CHART 2

CITIES WITH ACCREDITED CSPS COMPETITION

	1957	1958	1959	1960	1961
Boston	73.1	79.9	85.0	81.2	83.3
Cincinnati	90.9	90.1	89.8	75.5	82.6
Dallas	75.7	73.8	79.0	72.4	75.5
Dayton	90.0	90.9	94.3	71.9	77.3
Denver	92.4	90.1	92.5	83.6	84.5
Houston	91.3	86.3	90.0	87.7	85.5
Los Angeles	94.3	93.3	95.0	89.6	79.1
Milwaukee	95.2	89.2	92.0	85.2	87.6
Philadelphia	95.5	92.8	87.4	82.8	71.8
St. Louis	89.8	86.8	91.8	92.1	84.4

CITIES WITHOUT ACCREDITED CSPS COMPETITION

	1957	1958	1959	1960	1961
Atlanta	98.4	101.1	103.4	100.2	96.7
Buffalo	98.4	100.0	98.1	96.5	98.5
Louisville	98.3	99.5	95.1	101.4	98.0
Memphis	95.1	95.5	94.4	96.1	98.2
Miami	101.2	100.5	108.6	104.8	105.6
New Orleans	97.0	97.1	99.0	100.4	98.5
Omaha	95.7	97.5	103.0	96.7	97.5
Portland, Oreg	99.5	99.3	97.5	99.7	99.7
Salt Lake City	100.2	104.6	104.6	96.1	102.0
Seattle	97.8	99.2	100.0	96.8	98.6

CHART 3

Percentage of ADT's standard installation prices realized	Number of units (each city for each year considered as unit)		Percentage of units		Cumulative percentage of units	
	Competitive cities (accredited CSPS competitors)	Monopoly cities (no accredited CSPS competitors)	Competitive cities	Monopoly cities	Competitive cities	Monopoly cities
90.0 and over	18	292	14.2	58.8	14.2	58.8
80.0-80.0	27	101	21.3	20.3	35.5	79.1
70.0-70.0	31	67	24.4	13.5	59.9	92.6
60.0-60.0	30	22	23.6	4.4	83.5	97.0
50.0 and under	21	15	16.5	3.0	100.0	100.0
	127	497	100.0	100.0		

NOTE.—All cities are shown as Monopoly Cities with the following exceptions, which are indicated as Competitive Cities:

Albany
Baltimore—1961 only
Boston
Chicago
Cincinnati
Cleveland
Dallas
Dayton—1958–1961 only
Denver
Detroit
Houston
Indianapolis—1961 only
Los Angeles
Milwaukee
Minneapolis—1958–1961 only
Newark, N.J.
New York
Peoria—1958–1961 only
Philadelphia
San Francisco
St. Louis
Washington

The number of cities shown were obtained by using all the entries for all five years in GX 222 *Comparative Summary of Percentages of Minimum Basic Service Charges Secured.* Therefore, Chicago's five stations are counted separately as Chicago-Main, Chicago-Englewood, Chicago-North, Chicago-West, and Chicago-Yards, precisely as shown on GX 222. Similarly, Cleveland's three stations are counted separately.

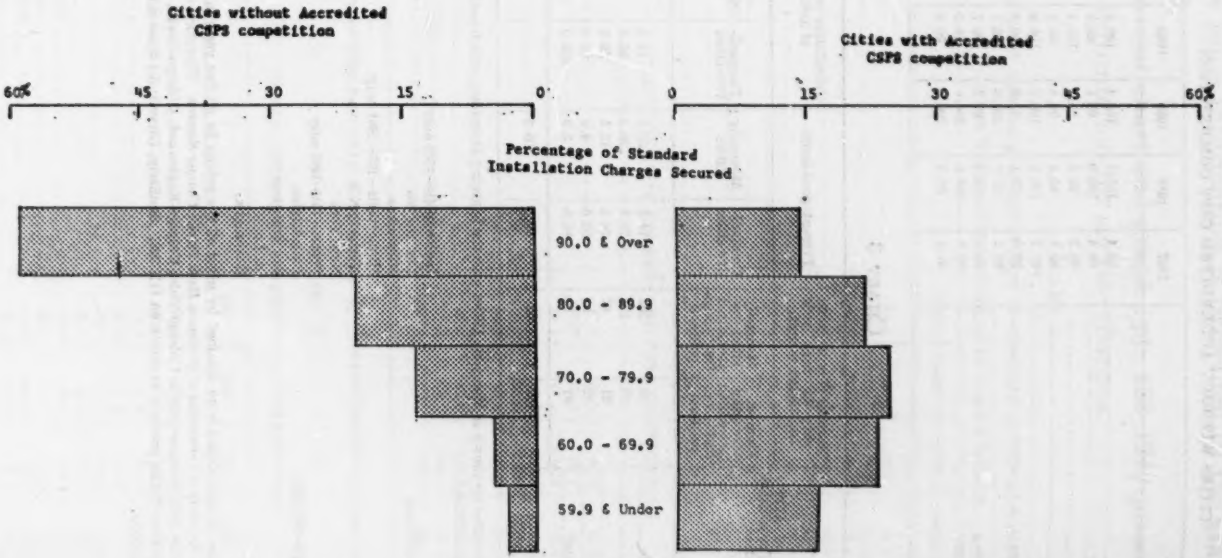
Cities without Accredited CSPS competition
Cities with Accredited CSPS competition
60%
45
30
15
0
0
15
30
45
60%
Percentage of Standard Installation Charges Secured
90.0 & Over
80.0 - 89.9
70.0 - 79.9
60.0 - 69.9
59.9 & Under

CHART 4

Percentage of ADT's standard prices realized	Number of units (each city for each year considered as unit)		Percentage of units		Cumulative percentage of units	
	Competitive cities (accredited CSPS competitors)	Monopoly cities (No accredited CSPS competitors)	Competitive cities	Monopoly cities	Competitive cities	Monopoly cities
90.0 and over	91	444	72.2	88.3	72.2	88.3
80.0-90.0	23	55	18.3	10.9	90.5	99.2
70.0-70.0	12	3	9.5	0.6	100.0	99.8
60.0-60.0					100.0	99.8
59.9 and under		1		0.2	100.0	100.0
	126	503	100.0	100.0		

NOTE.—All cities are shown as Monopoly Cities with the following exceptions, which are indicated as Competitive Cities:

Albany
Baltimore—1961 only
Boston
Chicago
Cincinnati
Cleveland
Dallas
Dayton—1958-1961 only
Denver
Detroit
Houston
Indianapolis—1961 only
Los Angeles
Milwaukee
Minneapolis—1958-1961 only
Newark, N.J.
New York
Peoria—1958-1961 only
Philadelphia
San Francisco
St. Louis
Washington

The number of cities shown were obtained by using all the entries for all five years in GX 222, *Comparative Summary of Percentages of Minimum Basic Service Charges Secured.* Therefore, Chicago's five stations are counted separately as Chicago-Main, Chicago-Englewood, Chicago-North, Chicago-West, and Chicago-Yards, precisely as shown on GX 222. Similarly, Cleveland's three stations are counted separately.

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